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The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy

By RICHARD J. PIERCE, JR.*

Introduction

The government has increased its degree of involvement in supervising the activities of energy suppliers as the magnitude of the energy problem confronting the United States has increased over the last decade. Established regulatory agencies, such as the former Federal Power Commission[1] (FPC), have experienced a substantial increase in the number of disputes they are asked to resolve, as corporations attempt to conform their past practices, price levels, and facilities to current economic, social, and physical circumstances. Relatively new regulatory agencies, like the former Federal Energy Administration (FEA),[2] were created virtually overnight to regulate major segments of the energy industry in a manner never before attempted.

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1. The FPC ceased to exist, and most of its powers were transferred to the Federal Energy Regulatory Commission (FERC), in 1977. Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977). This Article uses "FPC" to denote both the former Commission and its successor, the FERC.

2. The FEA was created in 1974. Federal Energy Administration Act of 1974, Pub. L. No. 93-275, 88 Stat. 96 (1974). Its genesis is described in REPORT OF THE PRESIDENTIAL TASK FORCE, FEDERAL ENERGY ADMINISTRATION REGULATION 5-14 (1977) [hereinafter cited as FEA REGULATION]. The FEA was abolished, and most of its functions were transferred to the Economic Regulatory Administration (ERA), in 1977, through the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977).

This expansion of government regulation of the energy industry in turn has provoked a mushrooming of the decisionmaking functions of energy regulatory agencies. Over a recent ten year period, the FPC's caseload increased over one hundred-fold in one major category of proceedings alone.[3] The FEA, which did not even exist before 1974, was asked to decide approximately 30,000 cases a year during 1975 and 1976.[4] Moreover, the increase in the number of cases brought before energy regulatory agencies does not fully reflect the greater burden on these agencies created by more complex and vigorously contested cases, a result of the higher stakes involved and the higher visibility of the issues.[5] Proceedings previously contested between a natural gas pipeline, the agency staff, and one or two major customers now attract the attention of scores of intervenors, including direct customers, suppliers, environmental groups, state utility commissions, and even senators and representatives. Cases which previously turned on the resolution of a few disputed accounting practices have become forums for considering a plethora of new rate setting methods. In short, to borrow Professor Boyer's terminology,[6] the traditional bipolar case in energy regulation has been replaced by the polycentric dispute.

The quantitative and qualitative increases in the workload of energy regulatory agencies not surprisingly have been accompanied by an increase in complaints that the agencies are not performing their assigned duties efficiently and effectively. Participants and observers

3. In 1966, two applications for rate increases were filed by natural gas pipelines. [1971] F.P.C. ANN. REP. 49. Two hundred fifteen such applications were filed in 1976. [1976] F.P.C. ANN. REP. 24. Of course, pipeline rate cases are only one of many categories of proceedings formerly under FPC jurisdiction. FPC's successor, the FERC, also must act upon wholesale electricity rate increases, gas producer rate filings, gas pipeline certificate applications, gas producer certificate applications, requests to abandon service or facilities, and a variety of miscellaneous disputes. In many of these categories, the level of activity is much higher than it is in the pipeline rate category. For instance, 15,657 applications for rate increases were filed by natural gas producers in 1976. *Id.* at 21. Slightly different bases of reporting categories of cases in the FPC's annual reports render a systematic summary of the aggregate increase in the FPC's workload difficult, but the number of disputes of virtually all types brought before the Commission appears to have increased dramatically over the past decade. During fiscal year 1978, FERC was asked to process 47,582 cases including 800 involving contested issues. Letter from Kenneth F. Plumb, FERC Secretary, to John Miller (Apr. 26, 1978).

4. *See* FEA REGULATION, *supra* note 2, at 143.

5. For instance, the natural gas pipeline rate increase applications filed with the FPC in 1975 requested an aggregate increase in revenues of over three and one-half billion dollars, an increase in total rates in excess of 30%. [1976] F.P.C. ANN. REP. 68.

6. *See* Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111 (1972).

decry what they perceive to be inordinate delays in the decisionmaking process[7] or criticize the quality of substantive decisionmaking.[8] Both criticisms appear well-founded. As of January 1978, the Federal Energy Regulatory Commission (FERC) had an "unpenetrable backlog" of 6,000 undecided cases,[9] the near paralysis which now afflicts the Nuclear Regulatory Commission had been documented thoroughly,[10] and the inability of the Economic Regulatory Administration (ERA) to make any sense of the crude oil entitlements program was notorious.[11]

Predictably, the initial response of government was the reorganization of all major federal agencies charged with decisionmaking in the energy area into one cabinet department via the Department of Energy Organization Act[12] (DOE Act). However, the limited potential for meaningful improvement of regulatory processes through reorganization,[13] and, in particular, the fragmented and confused decisionmaking structure resulting from the reorganization of energy agencies through the DOE Act,[14] make it difficult to put a great deal of faith in reorganization as a strong palliative for the maladies involved in regulating the

7. *See, e.g.*, SENATE COMM. ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION VOL. IV, DELAY IN THE REGULATORY PROCESS, S. DOC. No. 95-72, 95th Cong., 1st Sess. (1977) [hereinafter cited as REGULATORY DELAY].

8. *See, e.g.*, FEA REGULATION, *supra* note 2, at 139-46.

9. Speech of FERC Chairman Charles B. Curtis to the Federal Energy Bar Association (Jan. 26, 1978). FERC's backlog appears to be increasing. In 1978, FERC received 27,000 new cases and resolved only 3,000 old cases. Speech of FERC Chairman Charles B. Curtis to Public Utility Report's Utility Regulatory Conference (Oct. 4, 1978).

10. *See, e.g.*, REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES, REDUCING NUCLEAR POWER PLANT LEADTIMES: MANY OBSTACLES REMAIN (1977).

11. *See, e.g.*, FEA REGULATION, *supra* note 2, at 60-89 (noting problems FEA, predecessor to ERA, had with program).

12. Pub. L. No. 95-91, 91 Stat. 565 (1977).

13. *See, e.g., Symposium, Federal Regulatory Agencies: A Response to the Ash Report*, 57 VA. L. REV. 923 (1971).

14. The Department of Energy Organization Act established both a cabinet-level department within the administrative branch of government and an independent regulatory agency within that department. In several critical areas of regulatory policy, the jurisdictions of these two entities overlap in a manner that makes impasses resulting from conflicts between the two inevitable. For instance, the Department of Energy now has the authority to establish natural gas curtailment priorities, while FERC has the authority to determine the manner in which curtailment priorities are implemented. Department of Energy Organization Act, Pub. L. No. 95-91, § 402(a)(1)(E), 91 Stat. 565, 583-84 (1977). Similarly, the Department of Energy has total authority over natural gas imports, but FERC must determine the manner in which imported gas is transported, priced, and sold by interstate pipelines. *Id.* at §§ 402(a)(1)(C) and 402(f).

energy industry.[15]

This Article describes and evaluates the procedures used, or suggested for use, in making regulatory decisions affecting the production, sale, consumption, and pricing of various forms of energy. The author's intention is to suggest to legislators, agency administrators, and reviewing courts some broad criteria for selecting efficient and effective procedures for formulating and implementing regulatory policy. The emphasis throughout will be on regulation of the energy industry, but many of the broad parameters for selecting appropriate procedures should carry over to other areas of regulation and even to other areas of dispute resolution.

The Article approaches the task in several discrete steps. First, the results of a quantitative analysis of one area of energy regulation—development and implementation of natural gas curtailment (allocation) policy by the FPC—are described in some detail to illustrate the results of the FPC's choice of procedures. This descriptive section is followed by an assessment of the costs and disadvantages associated with the adjudicatory procedures used by the FPC to establish its policies on natural gas curtailment. Next, the costs and disadvantages asso-

15. Informed commentators have concluded that the problems of regulation are rooted in factors far more fundamental and impervious to remedy than mere choice of regulatory procedures. In particular, I have no intention to quarrel with Roger Noll's hypothesis that many flaws in regulation are a function of a political structure which selects, by design, inefficient and ineffective solutions to economic problems, *see* Noll, *The Economics and Politics of Regulation*, 57 VA. L. REV. 1016 (1971), nor with the theory shared by many that a large portion of regulation could be eliminated with a net positive impact on the welfare of all. *See, e.g.*, D. MARTIN & W. SCHWARTZ, DEREGULATING AMERICAN INDUSTRY (1977); Peacock & Rowley, *Welfare Economics and the Public Regulation of Natural Monopoly*, 1 J. PUB. ECON. 227 (1972); Posner, *Natural Monopoly and its Regulation*, 21 STAN. L. REV. 548 (1969). Nevertheless, there is a continuing need to focus upon the procedural side of the regulatory process. First, indulging in the assumption that consensus is possible and that substantial amounts of regulation are undesirable and counterproductive and should be eliminated, there still would remain some government regulation that would be considered by most either necessary or at least beneficial. Regulatory agencies therefore still would be faced with the task of formulating policies efficiently and effectively in those areas in which regulation was retained. Second, viewed realistically, the deregulation suggestion can never achieve anything close to its full potential. Efforts toward reducing the extent of government regulation in some areas invariably seem to be offset by increased regulation of other segments of the economy. In either event, therefore, the continued presence of government regulation of important sectors of the economy appears inevitable; thus, the choice of the most efficient and effective decisionmaking procedures to formulate and implement regulatory policies remains a pertinent area of study. This assumes, of course, that the parties involved in selecting those procedures—Congress, agencies, and reviewing courts—are motivated in part by a desire to adopt and effectuate good policies in an efficient manner. Dr. Noll has hypothesized that errors in regulation are intentional. If carried to its extreme, this suggestion implies that the study of agency procedures will always be counterproductive; if

ciated with the use of decisionmaking procedures at the opposite pole from pure adjudication—informal notice and comment rulemaking—are discussed in the context of recent efforts to regulate the energy industry. Here, the thesis is developed that pure notice and comment rulemaking, even for decisions which the Supreme Court recently has characterized as "rulemaking . . . in [its] most pristine sense,"[16] has significant disadvantages and inherent potential for abuse. Current proposals for improving both adjudicative and informal rulemaking are evaluated with regard to their probable impact upon energy policy formulation and implementation. The potential efficacy of several types of hybrid procedures also is explored.

The Article then outlines the broad contextual framework governing selection of administrative procedures, including both the constitutional and statutory constraints limiting the discretion of energy regulatory agencies in making such choices. In particular, the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*[17] is suggested as a touchstone for the overhaul of ineffective and inefficient adjudicatory procedures. Finally, criteria for selecting appropriate regulatory procedures that previously have been suggested elsewhere will be evaluated, and a new set of such criteria proposed.

The Costs of Using Adjudication

The Results of Attempts to Implement Natural Gas Curtailment Policy Through Adjudication

In April of 1971, the FPC recognized the need to establish and implement policies for allocating among competing claimants an aggregate supply of natural gas transported in interstate commerce that was substantially less than the demand for such gas, as indicated by sales contracts and certificates of public convenience and necessity representing the ostensible delivery obligations of interstate pipelines to

the responsible parties in fact do select procedures with the undisclosed intention of creating a regulatory scheme that produces irrational results favorable to their constituencies, such a study will permit selection of those procedures found to be least efficient and least effective. This Article, however, obviously is predicated on the assumption that Congress, regulatory agencies, and reviewing courts are motivated, at least in part, by a good faith desire to regulate efficiently and effectively.

16. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 524 n.1 (1978).

17. 435 U.S. 519 (1978).

their distributor and consumer customers.[18] Nonetheless, today, some eight years later, only the rare distributor or consumer has any better indication of the policies that will determine the amount of gas it will receive in the future than it had in April 1971. Eight years of efforts to establish curtailment policies have produced hundreds of thousands of pages of record evidence and scores of inconsistent agency and court opinions,[19] as well as many enriched energy lawyers and expert witnesses. Unfortunately, little meaningful progress has been made toward final effectuation of policies for allocating scarce supplies of natural gas.

With the exception of a series of nonbinding statements of general policy,[20] the sole procedural vehicle relied upon by the Commission in its efforts to establish curtailment policy has been a separate adjudicatory proceeding for every interstate pipeline. The following table displays the progress to date and the present status of the eight major curtailment proceedings.

18. On April 1, 1971, the FPC issued Order No. 431, in which it recognized that the gas shortage had reached the point at which many interstate pipelines were no longer able to meet the supply commitments contained in their outstanding contracts and certificates. That Order required all pipelines to submit a report to the FPC describing their present and anticipated future ability to meet their supply obligations and to file a revised tariff containing a proposed plan for curtailing deliveries under § 4 of the Natural Gas Act, if the report indicated a present or future need for curtailment. 36 Fed. Reg. 7,505 (1971).

19. See notes 22-28 *infra*.

20. In 1973, the FPC issued a series of orders announcing the curtailment priorities which it preferred as a matter of policy, and the preferred definitions of the terms used in the priorities. *See* 38 Fed. Reg. 30,432 (1973); 38 Fed. Reg. 27,351 (1973); 38 Fed. Reg. 6,384 (1973); 38 Fed. Reg. 1,503 (1973). The Commission's authority to issue these statements of general policy was affirmed in Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974). The priorities and definitions are codified at 18 C.F.R. § 2.78 (1978).

Even though the priorities and definitions contained in these policy statements could have no binding effect upon the outcome of curtailment proceedings because the FPC did not even purport to follow rulemaking procedures, they undoubtedly have served the dual functions of permitting parties to focus their evidence on the issues considered most significant by the FPC and of pressuring pipelines to file tariff provisions conforming to the Commission's policy preferences. The latter, in turn, produced many interim curtailment plans closely resembling the plan described in the FPC's policy statements, since the tariffs filed by pipelines under § 4 of the Natural Gas Act can go into effect pending the outcome of proceedings to determine the legality of the tariff provisions.

Recently, FERC and DOE have proposed to use rulemaking procedures to resolve several aspects of curtailment policy, *see, e.g.*, Proposal by the Federal Energy Regulatory Commission Relating to the Incorporation of Compensation Provisions in Curtailment Plans, 42 Fed. Reg. 62,496 (1977).

Major Curtailment Proceedings[21]

Proceeding	No. of days of hearings	No. of Transcript pages	No. of parties	No. of appellate and Supreme Court decisions	No. of interim plans	No. of states directly effected	No. of years in litigation to date	Present status
United	194	25,104	139	11[22]	5	5	8	New interim plan pending decision by FERC. Hearings on permanent plan continuing before administrative law judge (ALJ).
Panhandle Eastern	124	14,829	84	4[23]	3	6	7	Permanent plan ordered into effect and proceeding terminated on July 6, 1977.
Transcontinental	94	11,001	69	6[24]	5	12	8	Hearings on permanent plan continuing before ALJ after most recent court remand.
El Paso	144	19,988	95	3[25]	4	6	7	Hearings on permanent plan continuing before ALJ after most recent court remand.
Southern Natural	77	10,080	42	4[26]	4	6	9	Settlement including permanent plan approved and proceeding terminated on November, 17, 1977.
Columbia	96	14,287	84	1[27]	5	9	7	Hearings on permanent plan continuing before ALJ after court remand.
Texas Eastern	48	6,175	80	2[28]	3	12	8	Hearings on permanent plan continuing before ALJ; appeal of interim plan pending in D.C. Circuit.
Cities Service	59	9,644	43	0	2	5	4	Hearings on permanent plan continuing before ALJ; appeals of interim plan pending in 10th Circuit.

Footnotes appear on the following page.

Despite many thousands of pages of testimony and multiple visits to the appellate courts, many of the most important proceedings seem barely underway. Furthermore, the tabular indication that a few proceedings have reached final decision is misleading because those few were decided with reference to agency policies, the validity of which has been called into question by subsequent agency or court actions in other proceedings still officially pending.[29] If similar individual adjudi-

21. There are 29 interstate pipelines whose curtailment plans must come before the FPC or FERC for approval. However, many of those pipelines are small or have only a few customers, and the proceedings to determine a curtailment plan on those systems were relatively simple. In the case of a few major pipelines, most notably Texas Gas Transmission Corporation and Northwest Pipeline Company, curtailment plans were established which apparently were sufficiently acceptable to all affected parties to avoid protracted litigation. In any event, the proceedings listed in this table encompass the bulk of the United States interstate gas supply.

The information contained in these tables was obtained from the records of the following FPC and FERC proceedings: United Gas Pipe Line Co., Nos. RP 71-29, RP 71-120; Panhandle E. Pipe Line Co., No. RP 71-119; Transcontinental Gas Pipe Line Corp., No. RP 72-99; El Paso Natural Gas Co., No. RP 72-6; Southern Natural Gas Co., Nos. RP 71-3, RP 72-74, RP 74-6; Columbia Gas Transmission Corp., No. RP 72-89; Texas Eastern Transmission Corp., Nos. RP 71-130, RP 72-58; Cities Serv. Gas Co., No. RP 75-62.

22. FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972); Louisiana Power & Light Co. v. FPC, 557 F.2d 1122 (5th Cir. 1977); Southern Natural Gas Co. v. FERC, 565 F.2d 871 (5th Cir. 1977); Southern Natural Gas Co. v. FPC, 547 F.2d 826 (5th Cir. 1977); Southern Natural Gas Co. v. FPC, 543 F.2d 530 (5th Cir. 1976); Mississippi Pub. Serv. Comm'n v. FPC, 522 F.2d 1345 (5th Cir. 1975), *cert. denied*, 429 U.S. 870 (1976); Louisiana v. FPC, 503 F.2d 844 (5th Cir. 1974); Texas Gulf, Inc. v. FPC, 494 F.2d 789 (5th Cir. 1974); Louisiana Gas Serv. Co. v. FPC, 480 F.2d 933 (5th Cir. 1973); Louisiana Power & Light Co. v. United Gas Pipe Line Co., 456 F.2d 326 (5th Cir. 1972).

23. Hercules, Inc. v. FPC, 559 F.2d 1208 (3d Cir. 1977); Hercules, Inc. v. FPC, 552 F.2d 74 (3d Cir. 1977); Consolidated Edison Co. v. FPC, 512 F.2d 1332 (D.C. Cir. 1975); Consolidated Edison Co. v. FPC, 511 F.2d 372 (D.C. Cir. 1974).

24. FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976); North Carolina v. FERC, 584 F.2d 1003 (D.C. Cir. 1978); Philadelphia Gas Works v. FPC, 557 F.2d 840 (D.C. Cir. 1977); Consolidated Edison Co. v. FPC, 512 F.2d 1332 (D.C Cir. 1975); Consolidated Edison Co. v. FPC, 511 F.2d 372 (D.C. Cir. 1974).

25. City of Wilcox v. FPC, 567 F.2d 394 (D.C. Cir. 1977); Southern Cal. Edison Co. v. FPC, 524 F.2d 409 (D.C. Cir. 1975); American Smelting & Refining Co. v. FPC, 494 F.2d 925 (D.C. Cir. 1974).

26. Columbia Nitrogen Corp. v. FPC, 559 F.2d 377 (5th Cir. 1977); Consolidated Edison Co. v. FPC, 512 F.2d 1332 (D.C. Cir. 1975); Consolidated Edison Co. v. FPC, 511 F.2d 372 (D.C. Cir. 1974); Atlanta Gas Light Co. v. FPC, 476 F.2d 142 (5th Cir. 1973).

27. Elizabethtown Gas Co. v. FERC, 575 F.2d 885 (D.C. Cir. 1978).

28. United States Steel Corp. v. FPC, 533 F.2d 1217 (D.C. Cir. 1976); United States Steel Corp. v. FPC, 510 F.2d 689 (D.C. Cir. 1975).

29. A previously approved "permanent" curtailment plan, like any other aspect of a pipeline's tariff, is subject to the initiation of a new proceeding at any time in response to the filing of a complaint alleging that the tariff provisions are unlawful. 15 U.S.C. § 717d (1976). Because the curtailment policy which ultimately evolves through the agency adjudi-

catory proceedings continue to be the principal procedural vehicle for implementing curtailment policies, another decade or more is likely to pass before definitive federal gas curtailment policies are known and actually in effect.

Formulation of natural gas curtailment policy provides a valuable exemplar for evaluating the current benefits and detriments of using separate adjudicatory procedures to establish federal energy policy. While only one of many areas in which reliance upon individual adjudicatory proceedings has stymied federal regulatory policymaking,[30] the characteristics of natural gas curtailment policy formation render this area particularly appropriate as a basis for extrapolating the probable effect of using adjudicatory proceedings in the many other policymaking areas in which such use is likely to be given consideration. First, issues analogous to those inherent in allocating scarce natural gas already have arisen or are likely to arise with regard to other forms of energy, *e.g.*, petroleum products, coal, and electricity, and to nonenergy natural resources as well, such as water and minerals. Second, the nature of the dispute and the types of issues to be resolved in natural gas curtailment controversies resemble many other energy policy controversies involving rates, facilities design, siting, and the like.[31] Third, the FPC's experience in attempting to implement natural gas curtailment policies through adjudication is typical of other federal regulatory efforts to establish and implement through adjudicatory procedures complex policies with variable impact on large segments of the public,[32] thus dispelling the notion that only in extraordinary situations do

cation/appellate review process almost certainly will differ significantly from the policies implicit in the few "permanent" plans now contained in pipeline tariffs, the agency will be required to consider complaints alleging inconsistencies in the application of its curtailment policies. *See, e.g.*, Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, 412 U.S. 800, 807-08 (1973) (Interstate Commerce Commission); Columbia Broadcasting Sys., Inc. v. Federal Communications Comm'n, 454 F.2d 1018, 1026 (D.C. Cir. 1971).

30. For discussions of other examples of situations in which energy policymaking has been virtually paralyzed through the use of adjudication, see S. BREYER & P. MACAVOY, ENERGY REGULATION BY THE FEDERAL POWER COMMISSION 7-10, 66-71 (1974) (natural gas producer prices); REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES, THE NEW NATIONAL LIQUIFIED NATURAL GAS IMPORT POLICY REQUIRES FURTHER IMPROVEMENTS 14-15 (1977); REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES, REDUCING NUCLEAR POWER PLANT LEADTIMES: MANY OBSTACLES REMAIN (1977). For discussion of examples of delay resulting from the use of adjudication in a variety of other areas of regulation, see REGULATORY DELAY, *supra* note 7. *See also* Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276 (1972).

31. See text accompanying notes 369-98 *infra*.

32. See note 30 *supra*.

adjudicatory procedures break down as an effective regulatory tool.[33]

In a subsequent section of this Article, the characteristics of curtailment proceedings are compared with those of several other types of major energy policy disputes to determine the extent to which extrapolation from the FPC's experience in this area is productive.[34] For the present, however, a brief description of the issues and procedures of a typical curtailment proceeding will suffice to provide a basis for estimating the costs of employing adjudicatory procedures to formulate curtailment policy.

The Commission's Role

The Commission has the authority and obligation to determine the tariffs under which interstate pipelines provide natural gas to their wholesale customers—both intrastate distributors and direct industrial customers.[35] Although state regulatory agencies control the intrastate distribution of gas received from interstate pipelines,[36] the terms of delivery established at the wholesale level by the FPC can have a substantial, if not dispositive, effect upon the curtailment plans adopted by state agencies. In determining curtailment rules for the wholesale level, the Commission is not bound by the provisions of previously issued certificates;[37] it need approve only those rules it finds to be just, reasonable, and not unduly discriminatory.[38]

The Nature of the Contested Issues

The issues in a curtailment proceeding can be divided conveniently into four categories: (1) determining the basis on which curtailments will be imposed; (2) determining specific curtailment priorities; (3) selecting the method of implementing priorities; and (4) finding the facts necessary for actual implementation of the curtailment plan.

The first group of issues normally is raised by proposals presented by the parties to the proceeding and involves disputes over whether the basic curtailment scheme should distinguish, for example, between cus-

33. *See, e.g.*, Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 523-25 (1970).

34. See text accompanying notes 369-98 *infra*.

35. FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972).

36. *See* 15 U.S.C. § 717(c) (1976). *See also* M. WILLRICH, ADMINISTRATION OF ENERGY SHORTAGES 44-47 (1976).

37. FPC v. Louisiana Power & Light Co., 406 U.S. 621, 646-47 (1972).

38. 15 U.S.C. §§ 717c, 717d (1976). *See also* FPC v. Louisiana Power & Light Co., 406 U.S. 621, 643-46 (1972).

tomers based upon contractual provisions, historical consumption levels, the relative ability of specific users to substitute other fuels for natural gas, or the end products manufactured through the use of gas. Each such proposal may combine two or more of these factors and normally is supported by the testimony of expert economists and engineers. This expert testimony is used to outline the comparative aggregate costs and benefits of various ways of allocating the natural gas supply shortfall and often emphasizing the adverse impact of gas curtailment on some particular industry described as essential to the overall economic health of the nation, *e.g.*, refractory brick, automotive manufacturing, fertilizer, health care, or home-building. To date, the Commission has chosen end use as the principal criterion for allocating gas,[39] although even this basic decision has not been followed consistently by the agency[40] in the face of political[41] and judicial pressure.[42]

Once one or more principal criteria for curtailment are selected, they must be applied to determine actual curtailment priorities. Specifically, the Commission must classify the various end uses for curtailment purposes and accord each classification a degree of preferential access to gas. For example, some parties may contend that once existing residential uses are accommodated all commercial uses of gas should fall in the next priority, while others may contend that some commercial uses should be placed below some industrial uses because of differences in the relative ease and cost of substituting another fuel. Accommodating these competing interests typically generates much discussion and considerable conflicting expert testimony. The FPC has established a set of end use curtailment priorities as a matter of general

39. In its policy statements on curtailment, the Commission has stated: "As a matter of policy, we have determined that end use must be controlling." 38 Fed. Reg. 1,503 (1973).

40. Notwithstanding its stated dedication to end use as the controlling factor in curtailment policy, the original priorities adopted by the Commission relied heavily upon contractual language, specifically, whether service was contractually "firm" or "interruptible." The Commission's reliance upon such contractual distinctions was reversed in two of the earliest appellate decisions and has disappeared in most subsequent Commission decisions. *See* Arkansas Power & Light Co. v. FPC, 517 F.2d 1223 (D.C. Cir. 1975); Louisiana v. FPC, 503 F.2d 844 (5th Cir. 1974).

41. The end use basis for curtailment adopted by the FPC already has been legislatively modified. Section 401 of the Natural Gas Policy Act of 1978 requires that gas be made available to some types of "agricultural consumers" before it is made available to other types of consumers with comparable or even identical end uses. Pub. L. No. 95-621, 92 Stat. 3350 (1978).

42. In North Carolina v. FERC, 584 F.2d 1003 (D.C. Cir. 1978), the court held that the Commission's decision to base curtailments upon end use constitutes undue discrimination violating the Natural Gas Act unless the Commission modifies its end use data base or its methods of implementing curtailment plans.

policy,[43] but rarely has adopted those priorities in a particular proceeding without substantial modification.[44] Furthermore, its opinions establishing curtailment priorities have been reversed frequently by reviewing courts,[45] and the Commission continues to equivocate on several important priority-related issues.[46]

The third set of issues relates to the method of implementing curtailment priorities on the wholesale level. Typical questions arising here concern the past, present, or future base period of consumer use to be used in determining distributor's allocation. Also relevant are whether full requirements and partial requirements customers should be subject to the same or different implementation methods; whether customer size should be a factor; the role of stored gas supplies in implementing a curtailment plan; which implementation methods will encourage or discourage conservation and development of new gas supplies; the time span over which allocations should be made; and whether there should be compensation for those upon whom curtailment has disparate economic impacts. Every party has an individual interest and position on these difficult issues and the expert testimony addressed to the implementation issues is often complex, attempting to interrelate broad principles of equity, incentive, and disincentive to the characteristics of particular distribution systems and gas consumers. The Commission has attempted to resolve many implementation issues, but its pattern of decisions has not been entirely consistent.[47] Moreover, recent court opinions cast doubt on the continued viability of many of the implementation policies adopted to date by the Com-

43. *See* 18 C.F.R. § 2.78 (1978).

44. *See, e.g.*, Transcontinental Gas Pipe Line Corp., [1976] UTIL. L. REP. (CCH) ¶ 11,865; Panhandle E. Pipe Line Co., [1976] UTIL. L. REP. (CCH) ¶ 11,779.

45. *See, e.g.*, Arkansas Power & Light Co. v. FPC, 517 F.2d 1223 (D.C. Cir. 1975); Louisiana v. FPC, 503 F.2d 844 (5th Cir. 1974); American Smelting & Refining Co. v. FPC, 494 F.2d 925 (D.C. Cir. 1974).

46. *Compare* Michigan Wisconsin Pipeline Co., [1977] UTIL. L. REP. (CCH) ¶ 11,965 (stating that new residential customers should not be added to a pipeline system which is curtailing service to existing customers) *with* Cities Serv. Gas Co., No. RP 75-62 (1977) (Order Clarifying Prior Order) (permitting unlimited attachment of new residential customers on a pipeline system curtailing service to existing customers). The Commission's order is now on review in General Motors Corp. v. FPC, No. 78-1101 (10th Cir., filed Feb. 10, 1978).

The Natural Gas Policy Act of 1978 statutorily resolves a few of the priority of service issues. Pub. L. No. 95-621, 92 Stat. 3350 (1978). Moreover, DOE now has jurisdiction to determine priorities of service, but it has not yet exercised that authority. *See* Department of Energy Organization Act, Pub. L. No. 95-91, § 402(a)(1)(E), 91 Stat. 565, 583-84 (1977).

47. *Compare* Panhandle E. Pipe Line Co., [1976] UTIL. L. REP. (CCH) ¶ 11,779 (requiring adoption of a fixed historical base period) *with* Cities Serv. Gas Co., [1977] UTIL. L. REP. (CCH) ¶ 11,957 (rejecting use of a fixed historical base period).

mission.[48]

The final category of curtailment issues involves the compilation and testing of the data required to implement a particular curtailment plan. For instance, once the Commission has decided to distinguish between industrial users of gas who can convert to a nongaseous fuel from those that must have gas, this theoretical distinction must be applied to numerous combustion units supplied with gas obtained directly or indirectly from the pipeline. Once again, a plethora of engineering and economic evidence must be evaluated to resolve questions much more subtle in practice than in theory.

The Procedural Sequence

A curtailment proceeding is initiated in one of two ways: by a pipeline filing a proposed new tariff containing a curtailment plan,[49] or by the filing of a complaint alleging that the curtailment plan contained in a pipeline's existing tariff is unlawful.[50] In the case of a tariff filing by a pipeline, the filing is the subject of a public notice providing a time by which all interested parties must protest or comment upon the filing. After receiving protests, the Commission can suspend the operation of the proposed new tariff provisions for between one day and five months, and set the issues raised by the filing and protests for hearing before an administrative law judge (ALJ).[51] At the end of the suspension period, the pipeline has the unilateral power to place in effect the curtailment plan contained in its tariff filing pending the outcome of the proceedings to determine the lawfulness of the plan.[52] The pipeline, however, frequently chooses not to exercise this option out of fear of possible damage actions should its curtailment plan ultimately be held unlawful.[53] As a consequence, interim curtailment plans usually must be imposed during the pendency of the proceeding. The interim plans are typically short-term—one year is a common duration. They may go into effect as a result of a settlement agreement approved by the

48. *See, e.g.*, North Carolina v. FERC, 584 F.2d 1003 (D.C. Cir. 1978); City of Wilcox v. FPC, 567 F.2d 394 (D.C. Cir. 1977).

49. *See* 15 U.S.C. § 717c(d) (1976).

50. *See* 15 U.S.C. § 717d (1976).

51. *See* 15 U.S.C. § 717c(e) (1976).

52. *Id.*

53. The issue of whether, and under what circumstances, an interstate pipeline can be held liable for damages resulting from its failure to deliver volumes of gas committed under a contract is unsettled, notwithstanding the clear power of the Commission to require curtailments to be implemented in a manner inconsistent with contractual provisions. *See* International Paper Co. v. FPC, 476 F.2d 121 (5th Cir. 1973); Monsanto Co. v. FPC, 463 F.2d 799 (D.C. Cir. 1972).

Commission[54] or as a result of expedited hearings conducted specifically to determine interim curtailment priorities.[55] The inability to develop a record sufficient to support even an interim plan, bargaining impasses between the parties, or Commission disapprovals of a proposed settlement, all have led to the increasing imposition of interim curtailment plans directly by appellate courts.[56]

In the case of proceedings initiated by a complaint against an existing curtailment plan, the existing plan remains in effect until the proceeding reaches its conclusion, a stage that has not yet been reached in most curtailment proceedings initiated by filing a complaint.[57]

Whether the proceeding is initiated by complaint or by a protested tariff filing, once a hearing has been ordered and interested persons have been provided an opportunity to intervene, all parties are given an opportunity to submit direct testimony and exhibits, usually in several rounds, and all evidence tendered is subjected to cross-examination.[58] At the close of cross-examination, which may be several years later, at least two sets of briefs are filed before the ALJ,[59] and he or she issues an initial decision.[60] The ALJ's decision itself may be the subject of briefs filed with the Commission opposing and supporting the decision.[61] The Commission then issues its decision, which is not final until it issues a subsequent decision responsive to the inevitable applications for rehearing.[62]

The Commission's order on rehearing is then subject to appellate review,[63] which usually requires another one to three years. Rarely does the proceeding end at this point, for one or both of two reasons. In many cases, even several years of hearings have proven inadequate to permit the Commission to address all issues, thereby forcing the agency to implement yet another interim plan until additional evidence has been adduced.[64] In addition, the reviewing court frequently reverses the Commission's decision with respect to one or more issues

54. *See, e.g.*, Philadelphia Gas Works v. FPC, 557 F.2d 840 (D.C. Cir. 1977).
55. *See, e.g.*, American Smelting & Refining Co. v. FPC, 494 F.2d 925 (D.C. Cir. 1974).
56. *See, e.g.*, Southern Natural Gas Co. v. FPC, 543 F.2d 530 (5th Cir. 1976).
57. See notes 21-29 & accompanying text *supra*.
58. 18 C.F.R. §§ 1.8, 1.20 (1978).
59. *Id.* § 1.29(a).
60. *Id.* § 1.30(a).
61. *Id.* § 1.31.
62. *Id.* § 1.30(d).
63. 15 U.S.C. § 717r(b) (1976).
64. *E.g.*, Panhandle E. Pipe Line Co., [1976] UTIL. L. REP. (CCH) ¶ 11,779 (adopting an interim plan, rather than a permanent plan, because an environmental impact statement had not yet been offered in evidence and cross-examined).

and remands for further proceedings. When those further proceedings are concluded, another appeal may be taken, often resulting in a second reversal and remand on new grounds.[65] This brief outline demonstrates how an agency can make virtually no progress in an important area of policymaking despite an expenditure of enormous public and private resources.

Direct Costs

Costs of Full Participation by a Private Party

The direct costs incurred by private party participants in major curtailment proceedings cannot be derived directly from any available source. Many participants do not account for their litigation costs on an individual case basis, and those that do consider such data confidential. Reasonably accurate estimates of the private party costs incurred to date by full participation in the eight major curtailment proceedings under investigation may be made, however, by estimating the standard costs for certain units of measurement and multiplying those costs by the number of units attributable to each proceeding. The three most important units on which data is available are the number of hearing days, the number of interim curtailment plans placed in effect, and the number of appellate opinions issued. These three units of measurement can be used to approximate the costs of full participation in each of the three major phases of any curtailment proceeding: hearings leading to agency approval of a permanent curtailment plan; settlement negotiations or other procedures leading to agency approval of interim curtailment plans; and appellate litigation arising from agency orders issued during the course of curtailment proceedings. Two caveats are necessary. First, the cost estimates cannot be complete, because most, if not all, major curtailment proceedings are still far from complete.[66] The future level of activity and concomitant costs are too speculative for any reasonable estimate. Second, this should not be construed as an empirical effort to obtain pinpoint accuracy.[67] For present purposes,

65. *Compare* American Smelting & Refining Co. v. FPC, 494 F.2d 925 (D.C. Cir. 1974) (reversing the first interim curtailment plan imposed on the El Paso system) *with* City of Wilcox v. FPC, 567 F.2d 394 (D.C. Cir. 1977) (reversing on a variety of *different grounds* a second interim curtailment plan imposed on the El Paso system).

66. See text accompanying notes 21-29 *supra*.

67. Much of the following analysis on costs is predicated upon the author's personal experience. This experience suggests that all estimates are conservative average figures, although certainly individual differences may be found. Nonetheless, the lack of any readily, or even reasonably, available alternate source underscores the need for this type of estimation.

the magnitude of expense and not the precise figures are of concern.

Hearing Days

The cost of full participation in the hearings leading to agency approval of a permanent curtailment plan can be estimated using the number of actual hearing days. The standard cost per hearing day is calculated by estimating the resources expended per hearing day and assigning costs to those resources.

The major item of cost is, not surprisingly, lawyer time. The author's experience indicates that the average hearing day consumes approximately 16 hours of lawyer time, including the five to six hours of actual hearing time, working recesses, and travel time, as well as office time expended in hearing-related tasks, such as preparing direct testimony and cross-examination, and drafting pleadings and briefs for submission to the ALJ or agency. Experienced practitioners will recognize as conservative an estimated billing fee of sixty dollars per hour as the unit cost of lawyer time to be used in all calculations.

There is also a significant cost of nonlawyer time devoted to the hearing process, including expert witnesses, private party employee-witnesses, and other consultants. The demands placed upon the time of nonlegal personnel vary considerably during the hearing process, but, on the average, full participation in the proceeding requires approximately four hours of nonlawyer time per hearing day. Most of this time is devoted to activities outside the hearing room, such as preparing testimony and exhibits and assisting in preparing cross-examination. Sixty dollars per hour is used here throughout as the cost of nonlawyer time. Again, the estimate is conservative; both the energy consultants and the private party employees who participate, typically corporate officers, are highly-paid professionals.

Finally, an approximation of the out-of-pocket costs must be added to the personnel costs. A figure of $300 per hearing day is used to account primarily for hearing-related travel costs, purchase of transcripts, and reproduction and service of direct testimony, exhibits, pleadings, and briefs. On the basis of these estimated expenses, the approximate direct standard cost of full private party participation in the hearing process totals $1,500 per hearing day.[68]

68. (16 hours of lawyer time × $60 per hour) plus (4 hours of nonlawyer time × $60 per hour) plus ($300 per day out-of-pocket costs) = $1,500 per day.

Interim Curtailment Plans

Every time the need for an interim curtailment plan arises, private parties must incur additional costs uniquely attributable to obtaining agency approval of an interim plan. Typically, a settlement conference is convened outside of the formal hearing process, and all active parties spend somewhere between one week and several months attempting to negotiate an interim plan. Both legal and nonlegal personnel are involved intensively in the negotiation process. After the negotiations have been concluded—either successfully or unsuccessfully—additional lawyer time is required for the formal process of obtaining agency approval of an interim plan.[69] Combining the efforts of lawyers and nonlawyers, each private party actively participating in the process of devising and obtaining approval for an interim curtailment plan thus incurs estimated costs equivalent to 150 work hours, yielding a standard cost per interim settlement of $9,000 for each active party.[70]

Appellate Review

The final major category of private cost involves the appellate review process. Multiple appeals of both final and interlocutory agency orders are the norm in curtailment proceedings.[71] While there is considerable variation in the costs of each appellate proceeding depending upon the number and complexity of the issues raised, on average each private party actively participating in an appeal again will incur estimated costs equivalent to 150 hours of lawyer time, plus $3,000 in out-of-pocket costs for reproduction and service of briefs and joint appendices. Thus, the estimated standard cost assigned to each appellate re-

69. If a settlement agreement is reached, agency approval of the settlement must be obtained through a process of submitting the proposed settlement and filing comments either in support of or in opposition to the proposed settlement. 18 C.F.R. §§ 1.5, 1.8 (1978). Because most proposed interim settlements are not unanimous, two rounds of comments usually are required to permit opposing parties to respond to initial comments. If no settlement agreement is reached as a result of negotiations, the pipeline often will attempt to place an interim plan in effect unilaterally through a tariff filing under § 4 of the Natural Gas Act. See notes 51-56 & accompanying text *supra*. The tariff filing is then the subject of protests filed by all parties who oppose the plan selected by the pipeline. Alternatively, the Commission may attempt to place an interim plan in effect based upon the evidence contained in the partially completed hearing record. If it takes this action, it almost invariably calls for briefs on the interim plan. Through any of these methods, a significant amount of lawyer time is devoted to the process of obtaining approval of an interim plan.

70. $60 per hour × 150 hours = $9,000.

71. For instance, the United curtailment proceeding has been the subject of 11 appellate court opinions to date, and the proceeding is far from conclusion. See table accompanying notes 21-22 *supra*.

view proceeding is $12,000 per active private party.[72]

Applying these standard cost estimates to the eight major curtailment cases investigated yields the following estimates of total cost to date per active private party: United, $468,000;[73] Panhandle Eastern, $261,000;[74] Transcontinental, $258,000;[75] El Paso, $288,000;[76] Southern Natural, $199,500;[77] Columbia, $201,000;[78] Texas Eastern, $123,000;[79] Cities Service, $106,500.[80] Based on these estimates, the average private party cost to date in the eight proceedings is $238,125. Moreover, because most of the proceedings are far from complete, the final average cost of active participation is likely to swell to $300,000 or more per party.

Total Private Party Costs

In aggregating the total cost of private party participation in curtailment proceedings, consideration must be given to the costs of those parties who do not participate actively in each stage of the proceeding. Most intervening parties participate actively in only some phases or with respect to only certain issues. The average participation rate can be estimated at approximately thirty-five percent.[81] Therefore, the total private party cost to date of a curtailment proceeding can be estimated by multiplying the cost per active party times the average participation rate, times the number of parties.[82] The results for each of the eight

72. (150 hours × $60 per hour) plus $3,000 out-of-pocket costs = $12,000.

73. (194 days of hearing × $1,500 per day) plus (5 interim plans × $9,000 per plan) plus (11 appellate opinions × $12,000 per opinion) = $468,000.

74. (124 days of hearing × $1,500 per day) plus (3 interim plans × $9,000 per plan) plus (4 appellate opinions × $12,000 per opinion) = $261,000.

75. (94 days of hearing × $1,500 per day) plus (5 interim plans × $9,000 per plan) plus (6 appellate opinions × $12,000 per opinion) = $258,000.

76. (144 days of hearing × $1,500 per day) plus (4 interim plans × $9,000 per plan) plus (3 appellate opinions × $12,000 per opinion) = $288,000.

77. (77 days of hearing × $1,500 per day) plus (4 interim plans × $9,000 per plan) plus (4 appellate opinions × $12,000 per opinion) = $199,500.

78. (96 days of hearing × $1,500 per day) plus (5 interim plans × $9,000 per plan) plus (1 appellate opinion × $12,000 per opinion) = $201,000.

79. (48 days of hearing × $1,500 per day) plus (3 interim plans × $9,000 per plan) plus (2 appellate opinions × $12,000 per opinion) = $123,000.

80. (59 days of hearing × $1,500 per day) plus (2 interim plans × $9,000 per plan) = $106,500.

81. This figure is an estimate based upon the author's experience in curtailment cases and discussions with other participants.

82. The calculation of total private party costs excludes what may be an important component. Detailed data concerning the nature of the uses of gas by thousands of commercial and industrial consumers must be gathered as a basis for implementing curtailment plans based upon end use. This necessitates completion of an extensive questionnaire on gas

curtailment proceedings investigated are: United, $22,768,200;[83] Panhandle Eastern, $7,673,400;[84] Transcontinental, $6,230,700;[85] El Paso, $9,576,000;[86] Southern Natural, $2,932,650;[87] Columbia, $5,909,400;[88] Texas Eastern, $3,444,000;[89] Cities Service, $1,602,825.[90] These estimates show that the total private party costs to date for the eight proceedings approximates $60,137,175, and the average cost $7,517,147 per proceeding. Again, the total costs and average costs can be expected to swell substantially before the proceedings are concluded.

Costs to the Government

At least a portion of the direct governmental costs of adjudicating the eight cases can be estimated using the same methodology. This estimate involves only government personnel costs directly attributable to each proceeding, and does not include costs attributable to government printing and mailing of notices, orders, and the like, or to use of government facilities.

The direct personnel costs incurred by the government in a curtailment hearing include the salaries of the ALJ,[91] staff counsel,[92] and staff technical adviser.[93] All three of these individuals are present continuously while the hearing is in progress. Assuming that each of the government participants in the hearing process spends one day in hearing-related activities outside the hearing room for every day of actual hearing, the direct government personnel costs associated with the hearing

usage by each of the multitude of large commercial and industrial consumers receiving gas directly or indirectly from the pipeline whose curtailment plan is at issue. The cost of this data gathering effort is probably very high, but the author knows of no reliable method of estimating that cost, as there is wide variation in the amount of time and attention which customers are likely to devote to completing a questionnaire of this nature.

83. $468,000 × 139 × 0.35 = $22,768,200.
84. $261,000 × 84 × 0.35 = $7,673,400.
85. $258,000 × 69 × 0.35 = $6,230,700.
86. $288,000 × 95 × 0.35 = $9,576,000.
87. $199,500 × 42 × 0.35 = $2,932,650.
88. $201,000 × 84 × 0.35 = $5,909,400.
89. $123,000 × 80 × 0.35 = $3,444,000.
90. $106,500 × 43 × 0.35 = $1,602,825.
91. As of October 1977, the annual salary of an administrative law judge was $47,500. Civil Service Commission, General Salary Schedule (Oct. 4, 1977). *See also* 5 U.S.C. § 5308 (1976); 42 Fed. Reg. 10,297 (1977).
92. As of October 1977, the annual salary of a GS-12, Step 5 was $24,799. Civil Service Commission, General Salary Schedule (Oct. 4, 1977).
93. As of October 1977, the annual salary of a GS-11, Step 5 was $20,694. Civil Service Commission, General Salary Schedule (Oct. 4, 1977).

phase are approximately $795 per hearing day.[94] Accordingly, the direct government personnel costs of each interim curtailment plan placed in effect are approximately $3,645,[95] and the comparable costs for each appellate review proceeding are $2,363.[96] These approximations almost certainly are low when the expense of support personnel is considered.

Using these standard cost estimates, the direct government personnel costs to date for each of the eight curtailment proceedings investigated total:[97] United, $198,448;[98] Panhandle Eastern, $118,967;[99] Transcontinental, $107,133;[100] El Paso, $136,149;[101] Southern Natural, $85,247;[102] Columbia, $96,908;[103] Texas Eastern, $53,821;[104] Cities

94. Assuming that there are 234 working days in a year, the calculation is: ($47,500 + $24,799 + $20,694) × 2/234 = $794.81.

95. The ALJ has very little involvement in the process of negotiating and obtaining approval of an interim plan, but the staff counsel and technical advisor must put in at least as much time as their private party counterparts, a total of about 150 working hours. Thus, the costs are estimated as follows: ($24,799 + $20,694 (annual salary of staff counsel and technical advisor, see notes 92-93 *supra*)) × 150/8 (average number of working hours put in by staff counsel and technical advisor, divided by number of working hours per day) × 1/234 (one working day a year, see note 86 *supra*) = $3,645.27.

96. The government personnel cost of an appellate proceeding is estimated using the same procedures as were used for estimating private party appellate litigation costs, except that the salary of a GS-13, Step 5 is substituted for the hourly rate of the private attorney. $29,490 × 150/8 × 1/234 = $2,362.98.

97. At least one potentially significant component of government personnel costs is not included in these estimates. No factor is included for the Commission's decisionmaking time. The Commission issues scores of orders in the course of a curtailment proceeding, varying from routine orders granting intervention to lengthy and complex orders approving interim curtailment plans. Someone in the agency must devote a great deal of time to the decisionmaking and drafting underlying the issuance of these orders. However, the author does not know how to estimate the cost of this process because there is no adequate method of estimating how much of whose time is involved. Assuming the Commissioners actually read the evidentiary record before making decisions, as they theoretically are required to do by Morgan v. United States, 298 U.S. 468 (1936), the governmental cost of curtailment cases would be astronomical. However, this method of estimating decisionmaking costs while theoretically valid, is totally unrealistic. Unfortunately, given the agency's very heavy caseload, its modest budget, and the size of the evidentiary records in curtailment proceedings, it is likely that the total resources devoted to the actual decisionmaking process are not great. See text accompanying notes 97-107 *infra*.

98. (194 days of hearing × $795 per day) + (5 interim plans × $3,645 per plan) + (11 appellate opinions × $2,363 per opinion) = $198,448.

99. (124 days of hearing × $795 per day) + (3 interim plans × $3,645 per plan) + (4 appellate opinions × $2,363 per opinion) = $118,967.

100. (94 days of hearing × $795 per day) + (5 interim plans × $3,645 per plan) + (6 appellate opinions × $2,363 per opinion) = $107,133.

101. (144 days of hearing × $795 per day) + (4 interim plans × $3,645 per plan) + (3 appellate opinions × $2,363 per opinion) = $136,149.

102. (77 days of hearing × $795 per day) + (4 interim plans × $3,645 per plan) + (4 appellate opinions × $2,363 per opinion) = $85,247.

Service, $54,195.[105] The total government direct personnel cost to date is $850,868, and the average cost is $106,358 per proceeding—modest figures relative to the much greater direct private party costs, but still a very substantial commitment of resources to eight cases by an agency whose appropriation of $42,785,000[106] was spread among 47,582 cases in the 1978 fiscal year.[107]

Indirect Costs to the Economy

In addition to the direct costs of private and public parties associated with the use of adjudicatory procedures to formulate and implement policies, there are costs incurred indirectly by a wide variety of entities. The causal relationship between choice of procedures and indirect costs to the general economy is more difficult to perceive, and precise quantification of these costs is impossible. Yet, in all probability, these indirect economic costs are of much greater magnitude than the direct costs of implementing policy through adjudication.

In broad introductory outline, the relationship between adjudicatory procedures and indirect economic costs can be described as follows. First, adjudicatory procedures produce an environment of uncertainty for a protracted period of time. In turn, such uncertainty has been related directly to the performance of the economy in two respects: a low level of business investment and a high proportion of economically wasteful investment decisions. A low level of business investment produces a low level of economic growth and a high level of unemployment, both of which are inconsistent with the principal goals of macroeconomic policy.[108] Economic waste resulting from retrospectively imprudent investment decisions frustrates achievement of the microeconomic goal of efficiency. When the subject of adjudication, such as energy policy, is critical to a substantial portion of aggregate business investment, the uncertainty created by use of adjudicatory

103. (96 days of hearing × $795 per day) + (5 interim plans × $3,645 per plan) + (1 appellate opinion × $2,363 per opinion) = $96,908.

104. (48 days of hearing × $795 per day) + (3 interim plans × $3,645 per plan) + (2 appellate opinions × $2,363 per opinion) = $53,821.

105. (59 days of hearing × $795 per day) + (2 interim plans × $3,645 per plan) = $54,195.

106. Public Works for Water and Power Development and Energy Research Appropriation Act, 1978, Pub. L. No. 95-96, 91 Stat. 797, 807 (1978).

107. *See* Letter from Kenneth Plumb, FERC Secretary, to John Miller (Apr. 26, 1978).

108. Reduced economic growth and increased unemployment are the immediate adverse results of reduced business investment. In a subsequent period, prior reduced business investment can also contribute to inflationary pressure as a result of capacity constraints which are reached rapidly when demand increases.

procedures can have substantial adverse effects upon the overall performance of the economy.

As the description of the progress to date in the major curtailment cases illustrates, use of adjudicatory procedures to formulate and implement curtailment policy produces an environment of pervasive uncertainty for a protracted period of time.[109] A prospective investor considering future use of natural gas at a particular location or for a particular use must anticipate decisions in a curtailment proceeding with respect to each of several contested issues, when each of those decisions will be made, whether the agency voluntarily will defer implementation of its order[110] or will be subject to court stay of the order,[111] and the many possible results of appellate review.[112] A similar panoply of factors, each potentially critical to investment decisions, are present in the case of an interim curtailment plan.[113] Where voluntary agreement on an interim plan cannot be achieved or is overturned on review, the pipeline simply may file its own interim plan, to go into effect after the suspension period under section 4 of the Natural Gas Act;[114] the agency may coerce the pipeline into filing an interim plan reflecting the agency's policy preferences;[115] or a court may impose an interim plan intended to ameliorate the potential for immediate irreparable harm.[116] With the large number of actors in this drama—both

109. Empirical evidence strongly suggests that rulemaking produces results at least twice as fast as adjudication, and rulemaking by the FPC has in some instances produced policy decisions more than four times as rapidly as adjudication. REGULATORY DELAY, *supra* note 7, at 26-32.

110. *E.g.*, Cities Serv. Gas Co., [1977] UTIL. L. REP. (CCH) ¶ 11,995 (deferring indefinitely implementation of a critical provision of a previously imposed curtailment plan).

111. *See* Consolidated Edison Co. v. FPC, 511 F.2d 372, 376 (D.C. Cir. 1974) (referring to earlier orders in which two interim curtailment plans were stayed by the court and one of those stays was modified).

112. *Compare* American Smelting & Refining Co. v. FPC, 494 F.2d 925 (D.C. Cir. 1974) (permitting an interim plan established by the FPC, which had found the original curtailment plan to be discriminatory, to remain in effect pending the conclusion of proceedings on remand) *with* Louisiana v. FPC, 503 F.2d 844 (5th Cir. 1974) (requiring immediate reinstatement of a prior interim curtailment plan after reversing the Commission order imposing a new curtailment plan).

113. *See, e.g.*, Philadelphia Gas Works v. FPC, 557 F.2d 840 (D.C. Cir. 1977).

114. Section 4 of the NGA (codified at 15 U.S.C.A. § 717c(e) (1976)), provides that the Commission may suspend plans for five months only.

115. *See* Consolidated Edison Co. v. FPC, 512 F.2d 1332, 1341 (D.C. Cir. 1975). *Consolidated Edison* affirmed Commission orders which had the effect of pressuring several pipelines into filing interim curtailment plans consistent with the Commission's policies, while noting that several other pipelines had resisted Commission pressures and placed into effect interim curtailment plans of their own choosing.

116. *See, e.g.*, Southern Natural Gas Co. v. FPC, 543 F.2d 530, 532-33 (5th Cir. 1976); Consolidated Edison v. FPC, 511 F.2d 372, 378 (D.C. Cir. 1974).

parties and decisionmakers—and the large number of issues involved in the litigation, prediction is virtually impossible. The only real conclusions that the potential investor can reach are that gas may or may not be available at the location under consideration in the future depending upon the momentary outcome of an unpredictable game, that there probably will be periods in which gas is available and periods in which it is not, and that this environment of uncertainty with respect to gas availability could continue for decades or could stabilize abruptly as a result of a definitive agency or court decision.

The next logical step in the analysis is to explore the general relationship between uncertainty and the quantity and quality of business investments, leaving for last the relationship beween uncertainty in this particular area and specific types of investments. Economists and students of finance long have observed a strong negative correlation between uncertainty and the level of business investment.[117] The Council of Economic Advisors (CEA), in its 1978 Annual Report, describes the level of business capital outlay during the prior four years as "singularly disappointing" and "sluggish."[118] It credits much of the decline in the rate of growth of real gross national product during that period to lagging levels of business investment.[119]

The CEA expresses some difficulty in isolating the cause of lagging business investment, noting:

> [T]otal investment outlays during the expansion have fallen somewhat short of those implied by historical relationships of investment to its determinants. . . .
>
> The investment level for structures during the past few years . . . has fallen consistently and substantially below what would have been expected on the basis of all of the econometric projections. . . .[120]

However, the CEA goes on to list uncertainty generally, and uncertainty concerning future energy prices in particular, as the most likely cause of the disappointing level of business investment.[121]

There are a variety of ways in which regulatory uncertainty can

117. *See generally* H. LEVY & M. SARNAT, CAPITAL INVESTMENT AND FINANCIAL DECISIONS (1978) [hereinafter cited as CAPITAL INVESTMENT]; H. RAIFFA, DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY (1970) [hereinafter cited as DECISION ANALYSIS]; J. WESTON & E. BRIGHAM, MANAGERIAL FINANCE (1975) [hereinafter cited as MANAGERIAL FINANCE].

118. [1978] COUNCIL OF ECONOMIC ADVISERS ANN. REP. 37, *in* ECONOMIC REPORT OF THE PRESIDENT (1978).

119. *Id.* at 66.

120. *Id.* at 70-71.

121. *Id.* at 71-72, 113-14.

affect adversely the level of business investment. The most obvious and direct relationship is between the licensing process and investments in facilities subject to that process. There are, however, more important but less direct relationships as well. To the extent that uncertainty in the regulatory process produces uncertainty over the future price at which various forms of energy can be obtained, investment in a wide variety of industries will be retarded. To assess this impact accurately, the role of general uncertainty over energy price levels, as distinguished from the role of any particular expected future price trend, must be isolated and identified. An expectation that the future price of a particular form of energy will be low encourages investment in facilities designed to consume that type of energy, and expectation that the future price of a form of energy will be high encourages investment in alternative forms of energy as well as more fuel-efficient facilities. But uncertainty concerning future price levels of various forms of energy tends to discourage *all* of these types of investments by increasing the risk associated with each.

While the business investor has available a wide variety of tools for making decisions in conditions of uncertainty,[122] each of these methods of decisionmaking shares the common characteristic of aversion to risk.[123] Risk is simply the degree of variation in an asset's expected future return.[124] For example, investors place a higher value on an investment that is certain to produce a twelve percent rate of return than they do on an asset that will produce a rate of return somewhere between ten and fourteen percent.[125] As the degree of variation in expected return increases, the risk increases, and the investment looks less and less attractive to the investor.[126]

122. *See* CAPITAL INVESTMENT, *supra* note 117, at 188-203; DECISION ANALYSIS, *supra* note 117, at 86-94; MANAGERIAL FINANCE, *supra* note 117, at 314-17, 323-36, 354-61.

123. CAPITAL INVESTMENT, *supra* note 117, at 123-29; DECISION ANALYSIS, *supra* note 117, at 51-53; MANAGERIAL FINANCE, *supra* note 117, at 309, 317-21.

124. MANAGERIAL FINANCE, *supra* note 117, at 309.

125. Of course, productive assets are never risk-free. Thus, the critical factor is the degree of risk. *See* CAPITAL INVESTMENT, *supra* note 117, at 117-18.

126. Most firms apparently still rely principally upon subjective processes for evaluating risk and for discounting the value of assets depending upon their degree of risk, but the proportion which employ explicit methods of quantifying and considering varying degrees of risk has increased dramatically in recent years. CAPITAL INVESTMENT, *supra* note 117, at 187-88; MANAGERIAL FINANCE, *supra* note 117, at 323-24.

In illustrating the way in which uncertainty concerning future energy prices and availability of various forms of energy reduces the level of business investment, the variable discount rate is one of the simplest methods of quantifying risk aversion in investment decisions. For a detailed discussion of the variable discount rate method of quantification, see MANAGERIAL FINANCE, *supra* note 117, at 324-26. Under this approach to making in-

Obviously, the extent to which investments will be retarded by uncertainty concerning the future availability and price of various forms of energy will depend upon a number of factors that vary significantly from investment to investment. Uncertainty will not stop all investments from going forward. Once the risk-averse characteristic of investors is accepted, however, it necessarily follows that uncertainty concerning future energy prices and availability will cause a substantial number of investments not to be made. Such uncertainty also has the effect of increasing the proportion of investments which turn out in retrospect to have been imprudent. Even with the most risky investments precluded by uncertainty, a higher percentage of those investments that are made will prove to be "bad" investments. The facilities may have no economic value for a number of reasons, most especially if the energy form they are designed to use becomes unavailable. Of course, imprudent investments are an integral part of a market-oriented economy, and some level of bad investments is entirely consistent with a properly functioning market. Nonetheless, increases in the proportion of imprudent investments attributable to uncertainty which could have been avoided must be viewed as pure economic waste. Such waste is inconsistent with the principal microeconomic goal of maximizing aggregate consumer welfare with the least use of scarce resources.

Returning to the particular problem of natural gas supply, the the-

vestment decisions, the firm calculates two measures of the value of the investment, its expected monetary value (EMV) and its expected utility value (EUV). The terms "expected monetary value" and "expected utility value" are borrowed from DECISION ANALYSIS, *supra* note 117. The decision to invest or not is based upon EUV, and EUV is derived in part from EMV. EMV is the flow of dollars, discounted to present value, which can be expected from the investment on a probabilistic basis. For instance, if the firm believes that an investment has a 50% probability of producing revenues of $1,000 annually for five years and a 50% probability of producing revenues of $500 annually for five years, the EMV of the investment would be obtained simply by multiplying $750 by 5 and applying the appropriate discount rate. Typically, the discount rate used will be based in part upon the return available from alternate investments and in part upon the firm's cost of capital.

Calculation of EUV requires introduction of the investor's aversion to risk into the decisionmaking process. The variation in return from $500 to $1,000 per year in the example used above will cause the firm to consider the investment riskier, and therefore less attractive, than an investment which is certain to yield a cash flow of $750 per year. To reflect this negative taste for risk, the firm can calculate the range of EMVs an investment is likely to yield based upon the range of future conditions in which the asset must function. If this range of EMVs exceeds a predetermined criterion for riskiness, the investment is placed in a higher risk category. Under the variable discount rate approach to reflecting risk aversion, a different rate is used to discount to present value the expected cash flow of investments falling in each risk classification, with a higher discount rate assigned to the higher risk investments. The EUV is also calculated on a probabilistic basis, but using the discount rate determined by measuring riskiness with reference to the range and distribution of EMVs.

oretical link between gas supply availability and investment level can be tested by considering the types of investments likely to be affected by the ultimate resolution of one of the major curtailment policy issues—the question whether existing industrial process uses or new residential uses will be preferred in curtailment plans. If the resolution of this issue were known to be favorable to new residential consumers, many existing industrial consumers would be faced with strong incentives to invest in combustion equipment conversion or in new facilities designed to use alternative forms of energy. Distributors, anticipating a more severe load-balancing problem as the proportion of low load factor residential customers increases, would face similar incentives to invest in additional storage and peak-shaving facilities. If, on the other hand, investors knew that this issue would be resolved in favor of existing industrial consumers, an entirely different pattern of investments could be expected. The industrial consumers whose facilities thereby were protected from economic obsolesence could safely improve and expand their existing gas-burning facilities. Moreover, investments in feeder plants and customer plants could be made with greater certainty of economic feasibility. As a corollary, suppliers of those forms of energy, such as electricity and fuel oil, likely to become predominant in the new residential market would be led to invest in necessary new facilities. The same may be said for those firms that manufacture residential combustion equipment designed to burn fuels other than gas.

The point of this discussion is not to suggest that regulatory policy should be designed to maximize investment. Indeed, given a choice between achieving an economic goal with high investment or low investment, economic theory almost invariably supports the choice of the low investment means to an end. However, when investors have no rational means of forecasting future conditions, no investment will occur and no economic goal will be pursued. The inevitable result is economic stagnation. Even a policy that induces less than optimally efficient actions may be preferable to failing to adopt any policy for a protracted period of time.

Some crucial caveats are in order. This argument is not intended to suggest that the recent stagnation of the United States economy is attributable entirely, or even in large measure, to the FPC's decision to use adjudicatory procedures to formulate and implement its natural gas curtailment policy. Even to the extent that uncertainty regarding energy availability and cost is responsible, domestic governmental activity cannot be cited as the only source of uncertainty that could reduce the level of energy-related investment. Other factors, such as the un-

certain size of the resource base and even the weather, could have significant adverse effects on the level of business investment. In addition, regulatory activity is only one source of uncertainty originating from government actions. Difficulty in predicting the actions of Congress may be a far more significant factor. Given the wide range of energy policy options under serious consideration by Congress today, a good case can be made that Congress is the single most significant source of investment-retarding uncertainty. And even if the focus is restricted to regulatory actions, there is no one-to-one relationship between adjudicatory procedures and uncertainty concerning future policies. If all energy regulatory policy decisions were made and implemented through informal procedures, the very existence of the awesome powers of the regulatory agencies and the effect upon them of conflicting political forces would still be significant sources of uncertainty.

What is suggested is only that some modest portion of that stagnation may be attributable to the FPC's choice of decisionmaking procedures, and that the cumulative effect on investors of using adjudication to resolve policy disputes of this nature is substantial. The theoretical support for the existence of such a relationship is strong, and the author's experience with business firms corroborates the existence of such a relationship. Investors frequently approach their energy lawyers with a proposal to build a new facility and request that the lawyers assess the likelihood that changes in regulatory policy will impinge upon the future economic viability of the facility. Such plans for new facilities may be abandoned or deferred indefinitely after receipt of a lengthy opinion letter detailing the potential regulatory decisions which could materially affect the facility and describing the difficulty inherent in predicting either the outcome or the timing of those decisions.

Costs in Reduced Effectiveness of Regulation

The use of adjudicatory procedures in polycentric energy proceedings actually may detract from the effectiveness of regulatory programs. These costs to regulatory effectiveness flow inevitably from the characteristics inherent in polycentric adjudication.

At the threshold, the extraordinary costs incurred to participate meaningfully in polycentric adjudications can be analogized to barriers to entry in an industry. Large groups of individuals whose aggregate interest in the outcome of a proceeding is great but whose individual interest is insufficient to justify separate representation in general are

incapable of effective input into regulatory decisions.[127] Rarely do the names of groups or individuals representing environmental interests, residential consumers, small commercial or industrial consumers, or even medium-sized business consumers of natural gas appear on the service list in any natural gas curtailment proceeding. When such groups do intervene in polycentric adjudicatory proceedings, their participation typically is limited to cameo appearances when an extraordinarily important witness is scheduled to appear. In addition, they suffer from unfamiliarity with the vast bulk of the evidence amassed in the record. While the elimination of adjudicatory proceedings to resolve complex, multifaceted regulatory disputes alone will not provide all significantly affected groups with meaningful input into agency decisions, the continued heavy reliance upon adjudication will render the task of finding acceptable solutions to this problem nearly impossible.

A second related reduction in effectiveness is attributable to the massive, unwieldy record created in a proceeding of this type. A record of 20,000 or more pages renders a good overview of the issues and the significant testimony almost unobtainable. Furthermore, parties may attempt on brief to focus the decisionmaker's attention on discrete items of evidence which tend to support that party's position, if taken alone, but which are of little probative value when considered in the context of the entire record.[128] Such "sandbagging" can be an effective tactic in polycentric adjudication, especially given that one judge rarely presides over the entire proceeding and the presiding judge's input to the ultimate decision is in any event slight.[129] Applying the "substantial evidence on the record as a whole" standard of *Universal Camera Corp. v. NLRB*[130] in cases of this type is a nearly hopeless task.

The viability of such tactics points to the extremely significant role the tactical skills of the advocate play in shaping the outcome of

127. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972).

128. An effective tactic is to get into the record, preferably on a relatively quiet hearing day, a few statements that support your client's position when taken out of context, rely heavily upon those statements on brief, and leave your opponents the incredibly difficult job of searching the massive record for evidence that erodes the impact of the isolated supporting statements. Of course, even better is to cite favorable evidence out of context for the first time in a reply brief, thereby cutting off all opportunity for opponents to place the statement in context. This choice of tactics is based upon the realistic expectation that the decisionmaker rarely will have the time necessary to make an independent perusal of the record to find contradictory or contextual evidence.

129. See text accompanying notes 173-75 *infra*.

130. 340 U.S. 474, 476 (1951).

polycentric adjudication. The size of the evidentiary record, the number of issues in dispute, and the wide variety of ways in which the issues can be framed combine to produce a situation in which the relative skills of the advocates may dominate all other factors in determining the outcome of the proceeding, particularly at the appellate level. The resulting decisions will constitute effective regulation only in those fortuitous circumstances in which the most effective advocates happen to be retained by the parties whose views are most consistent with the overall public interest.

The compilation of a massive record also impairs the decisionmaker's ability to focus on the overriding policy issues raised by the proceeding. The bulk of the evidence consists of descriptions of factual situations which, even if accurate at the time asserted, almost certainly will have changed by the time the record becomes the basis for a final decision.[131] These stale specifics tend to bury the critical long term issue of how a set of rules established today will modify future conduct.

An often overlooked cost of using adjudication to resolve hundreds of thousands of disputed issues in a single case originates with the misleading doctrine that the resolution of each factual issue is considered a final determination because each issue was subjected to cross-examination and impeachment. Even parties with sufficient interest in the outcome to justify well-financed participation must be very selective in the issues on which they adequately prepare cross-examination. No party can afford to conduct independent research on each of the factual contentions recited by opposing witnesses, yet all the myriad facts that theoretically are at issue and subject to cross may be deemed resolved for res judicata and collateral estoppel purposes.[132] Thus, the

131. For instance, in a curtailment proceeding the Commission receives evidence from hundreds of industrial consumers contending that one or more of their uses of gas is a "use for which alternate fuels are not technically feasible" to determine whether uses qualify as high priority process gas. *See* 18 C.F.R. § 2.78(c)(8) (1978). Yet the ability to convert a combustion unit to a nongaseous fuel and the cost of such conversion depends critically upon the state of combustion equipment conversion technology at any given point in time, and tremendous advances in the technology required to convert from a gaseous fuel have been made in recent years as a result of curtailment and rapidly escalating gas prices. Thus, a credible contention that a use qualifies for the process gas classification made in testimony introduced in evidence in the early 1970s may be baseless when a decision is rendered by the agency in the late 1970s.

132. *See* United States v. Utah Const. & Mining Co., 384 U.S. 394 (1966). *See also* Transcontinental Gas Pipe Line Corp., No. RP 72-99 (1978) (Order Requiring Additional Information) (recognizing that res judicata may preclude changing an end use classification but expressing frustration at apparent major conflicts in testimony).

agency has little power to correct errors based upon incorrectly found facts when those errors subsequently are detected and brought to the agency's attention.

Another danger lies in the well documented potential for agency reliance upon adjudication in complex regulatory proceedings to lead to a general paralysis of efforts to formulate or implement policy.[133] When an agency has been assigned the task of establishing and applying a policy, but its realistic assessment of the situation indicates that the task can be accomplished only through a decade or more of multiple adjudicatory proceedings requiring an extensive commitment of scarce agency resources, there is an understandable temptation to abdicate in whole or in part its regulatory responsibilities in that area. Although this has not yet become a serious problem in the area of gas curtailment policy, such an occurrence is not unheard of elsewhere.[134] In addition, there are strong indications that the costs of implementing curtailment policy through adjudication may cause an agency to be satisfied with something well short of full implementation of its policy.[135]

Moreover, the perceived need to commit an enormous proportion of total agency resources to a single area of policymaking undoubtedly deters positive policymaking, *i.e.*, attempts to avoid future problems through establishment of new policies. Agencies can develop a fireman's reaction in responding only to existing, acute problems when they recognize that any effort to act affirmatively will require years of costly hearings and will produce uncertainty harmful to all affected interests.

133. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1283-1313 (1972).

134. *Id.*

135. For instance, in one recent proceeding, when confronted with a complaint requesting a hearing to determine whether a curtailment plan *inconsistent with all major elements of the Commission's curtailment policy* should be modified, the agency refused to order hearings and dismissed the complaint. It explained that it was unwilling to initiate a hearing to determine whether a plan inconsistent with its policies was unlawful unless the party requesting the hearing could prove in advance of hearing that the nonconforming plan was causing direct and immediate harm. General Motors Corp. v. Natural Gas Pipeline Co., No. RP 76-86 (1977), *appeal docketed*, D.C. Cir. No. 77-1859 (D.C. Cir. 1977) (Order Granting Motion to Dismiss Complaint and Request for Order to Show Cause and Permitting Interventions). *See also* United Gas Pipe Line Co., [1978] UTIL. L. REP. (CCH) ¶ 12,138 (admitting that eight years of hearings had failed to support adoption of a curtailment plan in a court review proceeding and ordering a conference of all parties to determine what, if any, further procedures should be pursued).

Methods of Reducing the Costs of Adjudication

Although many participants and observers have recognized the flaws of adjudication, some have suggested that the problem lies in the way in which adjudication is used, rather than in the adjudicatory process per se.[136] Suggestions abound on modifications to the adjudicatory process designed to reduce its costs and enhance its efficiency, while retaining its perceived value as a method of finding truth, testing opinions, and the like.[137] Most suggestions entail changes in the trial process itself, *e.g.*, greater use of discovery, more precise notice of issues, limiting cross-examination in various ways, and relaxing requirements for admission of evidence.[138] However, before discussing each of these potential mechanisms, it is useful to explore one popular method of resolving costs of adjudication by changing the scope of proceedings.

Generic Adjudicatory Proceedings

In recent years, several of the relatively "new" agencies, most notably the Environmental Protection Agency (EPA) and the Nuclear Regulatory Commission (NRC), have placed great reliance upon the use of "generic" adjudicatory proceedings to resolve issues of fact or mixed fact and policy that are common to more than one dispute. Despite strong support for increased use of generic hearings in licensing and rate cases from the Administrative Conference,[139] the FPC has eschewed this method of proceeding.

Use of generic hearings in an area such as establishment of natural gas curtailment priorities offers a few advantages so obvious that it is difficult to understand why the Commission has ignored this option. Issues such as whether the use of natural gas under boilers should be in a priority below other industrial uses and whether process and feedstock uses should be above other industrial uses, to which scores of days of hearing have been devoted in *each* pipeline curtailment proceeding, could have been resolved in a single generic proceeding with-

136. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970). *See also* Testimony of Seymour Wenner before the Senate Committee on Government Operations, *reprinted in* REGULATORY DELAY, *supra* note 7, at 175-200.

137. *See, e.g.*, Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 513-39 (1970).

138. See notes 147-75 & accompanying text *infra*.

139. *See* Administrative Conference Recommendation No. 78-1, 1 C.F.R. § 305.78-1 (1979).

out any loss of decisionmaking quality. The evidence on which these decisions were based in individual proceedings was virtually identical,[140] as was the cross-examination. While arguably unique circumstances might require a curtailment priority classification for a particular facility different from that of similar facilities, the pipeline-by-pipeline approach to adjudicating curtailment priorities does not avoid this problem, because each pipeline itself serves thousands of different and geographically scattered facilities. Thus, generic hearings could provide for some method of reclassification based upon extraordinary circumstances as easily as more traditional proceedings.[141]

The advantages of the generic hearing as a method of resolving questions concerning the appropriate mechanism for implementing a curtailment plan are less clear. In this area the circumstances of individual customers of the pipeline typically become the focal point. Fairly compelling arguments thus can be made that the implementation mechanism appropriate for a pipeline whose customers are all large multisupply source distributors differs from that appropriate for a pipeline whose customers include some small sole requirements distributors. Of course, adjudication costs would not be reduced if a generic hearing on mechanisms for implementing curtailment plans were to become a forum for determining the characteristics of every gas distributor in the country; however, a generic hearing that would provide a forum suitably tailored to implementation issues appears quite plausible if focused upon the appropriate *types* of characteristics by which pipeline systems and classes of pipeline customers can be differentiated. The factors relevant to implementation issues[142] are sufficiently susceptible to generalization that they appear well-suited to the generic hearing approach. Indeed, the agency has come to similar conclusions on these issues in the pipeline-by-pipeline adjudications that have taken place to date. To the extent that the issues have been resolved differently in particular proceedings, such results appear to reflect happenstance far more than any real difference in circumstances.[143] Moreover,

140. The principal item of evidence supporting a low curtailment priority for boiler fuel uses relied upon in almost all curtailment proceedings was a 1971 report to the General Counsel of General Motors Corporation. J. Jensen & T. Stauffer, Implications of Natural Gas Consumption Patterns for the Implementation of End-Use Priority Programs (1971). This report was introduced as an exhibit and sponsored by its authors in almost all curtailment proceedings.

141. *See, e.g.*, Cities Serv. Gas Co., [1977] UTIL. L. REP. (CCH) ¶ 11,957, at 12,284-86.

142. See text accompanying notes 47-48 *supra*.

143. For instance, almost all curtailment plans approved by the Commission have a special exemption from curtailment for small distributors meeting certain conditions, but the volumetric cutoff for qualifying as a small distributor varies from plan to plan without any

the generic hearing approach probably would improve the quality of decisionmaking on these issues by focusing more attention on the broad policy implications inherent in a one time decision with national impact than would a series of ad hoc resolutions of specific narrow disputes.

Nonetheless, more detailed scrutiny is warranted to determine the types of costs of case-by-case adjudication which can be avoided or reduced by adopting the generic hearing approach. Use of generic hearings almost certainly would reduce the direct transactions cost of adjudication substantially. To try in a single proceeding the issue of whether boilers are uniquely capable of inexpensive conversion to oil cannot possibly take as much agency and private party resources as are required to try the same issue in more than twenty proceedings. Substituting generic hearings for case-by-case adjudication, however, may increase the indirect economic costs of adjudication. If, as postulated earlier,[144] the indirect economic costs of using adjudication are greater than the direct costs, the incremental benefits of a transition to generic hearings may be slight or even negative.

Two different uses of generic hearings can be envisioned: a separate hearing for each major curtailment issue (or group of issues); or a single generic curtailment proceeding to resolve all issues that are susceptible to standardized resolution. Although separate issue-oriented proceedings theoretically could expedite the implementation of a complete curtailment policy by conducting hearings concurrently, in practice this segmented approach probably would not prove very effective. First, all curtailment issues are closely related, and segregating them into neat compartments would be both difficult and conducive to the adoption of a policy whose component parts, though individually well-conceived, do not form a coherent whole. Second, the theoretical ability to conduct the issue-oriented proceedings concurrently would be limited greatly by the fact that many of the same parties and lawyers are likely to be active participants in all of the proceedings. Third, if a problem developed in just one generic proceeding, with a consequent delay in its completion, quite likely the entire curtailment policy would be delayed.

Accordingly, the second approach—a single all-encompassing ge-

explanation of the reasons for the variations. *Compare* Panhandle E. Pipe Line Co., [1976] UTIL. L. REP. (CCH) ¶ 11,779, at 13,691 (establishing small distributor cutoff at 6,000 Mcf per day) *with* Transcontinental Gas Pipe Line Corp., [1976] UTIL. L. REV. (CCH) ¶ 11,865, at 14,157 (establishing cutoff at 7,500 Mcf per day).

144. See text accompanying notes 108-26 *supra*.

neric curtailment proceeding—is the more realistic option. Because such a proceeding would raise all of the problems of polycentric adjudication characteristic of individual pipeline curtailment proceedings, with additional complications arising both from variations in impact from one pipeline system to another and from a much larger number of parties, there is little doubt that the generic adjudicatory hearing actually would take a longer time to run its course than any individual pipeline proceeding. Hence, investor uncertainty concerning future gas availability would increase in duration, and with it the indirect economic costs of using adjudication for making energy policy decisions. Moreover, if one believes, as the Commission and some courts apparently do,[145] that the unique characteristics of each pipeline system are important factors in devising an appropriate curtailment plan, generic hearings may be viewed as substantively counterproductive.

Shortcuts in the Adjudicatory Process

Other proposals would enhance the efficiency of adjudication through the use of various devices to contract the hearing process itself, and could be used in conjunction with either case-by-case adjudication or generic hearings. The most significant of these suggestions actually have been implemented in one or more curtailment proceedings,[146] and all have been given serious consideration by at least one or more administrative law judges. For the sake of simplicity, the suggestions are treated under the following categories: precise notice of issues and phasing of proceedings according to issue; use of experts to cross-examine expert witnesses; imposition of limits on cross-examination; relaxation of rules of evidence; greater use of discovery; and imposition of limits on duration of proceedings.

Precise Notice of Issues and Phasing

The protracted nature of administrative adjudication has been described by one school of thought as largely a function of an agency's failure to specify clearly the issues to be resolved and the kind of evidence the agency wishes to receive on those issues.[147] Too many

145. *See* FPC v. Louisiana Power & Light Co., 406 U.S. 621, 645 (1972); 38 Fed. Reg. 1,503 (1973).

146. See notes 147-49, 157-58 & accompanying text *infra*.

147. *See* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 524-45 (1970). *See also* Hamilton, *Rulemaking on a Record by the Food & Drug Administration*, 50 TEX. L. REV. 1132, 1163-66 (1972).

agency orders initiating an adjudicatory proceeding state merely that someone has identified a problem (*e.g.*, the existence of a gas shortage on an interstate pipeline system) and has proposed one solution to that problem (by filing a proposed tariff revision or a complaint concerning an existing tariff provision) and then invite all parties with an interest in the resolution of this problem to intervene and participate in a hearing. The parties are left the task of defining the issues and determining the evidence to offer on those issues, and the ALJ is given no standards to determine the relevancy or probative value of proffered evidence. Consequently, a mass of unstructured evidence is tendered, accepted, and cross-examined at length, often with both the participants and the ALJ uncertain about its significance. Commentators have suggested that this problem can be eliminated if the agency makes explicit the issues it considers to be raised in the proceeding and the kind of evidence it would find probative.[148] Phasing—or dividing a proceeding into several discrete segments in which particular issues are addressed—is a logical extension of the issue specification process.

Unfortunately, in practice this prescription has had no beneficial effect on the underlying malady. The FPC tried both more precise issue identification and phasing in several proceedings, most especially in the *United* curtailment proceeding.[149] The results to date hardly are encouraging; as the prior description of the proceeding indicates, *United* is one of the two or three curtailment proceedings in which the least progress has been made over the greatest period of time.[150]

The shortcomings of precise notice and phasing appear to lie in several areas. First, the agency cannot anticipate accurately at an early stage of the proceeding those issues likely to be controverted or even the kinds of evidence likely to be valuable to the agency when the proceeding ultimately reaches it for decision. Second, a reviewing court is unlikely to agree with the agency's assessment in any event. Third—and this factor explains in large part the failure of phasing—the issues are not readily susceptible to isolation. For instance, considering priority issues separate from implementation issues may distort the end result because the effect of any set of priorities in protecting particular end uses from curtailment will depend to a large extent upon the way

148. See note 147 *supra*.

149. United Gas Pipe Line Co., Nos. RP 71-29, RP 71-120.

150. The ill-fated *United* proceeding has been the subject of 11 separate appellate court decisions in eight years. Despite the amassing of 25,104 pages of testimony and at least an equal number of pages of exhibits, the proceeding is far from being concluded. See table accompanying note 21 *supra*.

in which those priorities are implemented.[151]

As a result of these factors, attempts to define issues more precisely in advance of hearings have produced frequent interlocutory appeals from evidentiary decisions of ALJs and motions for clarification of the scope of the proceedings. These appeals have been sufficiently successful with the agency and reviewing courts that delays resulting from remands based upon failure to accept evidence tendered at the hearing have far exceeded the amount of time saved. Moreover, in the case of phased proceedings, the interrelationship between the issues under consideration in each theoretically discrete phase has forced parties to offer, and ALJs to accept, overlapping evidence in several phases, with the obvious effect of retarding progress toward an ultimate decision in the proceeding.

Use of Experts to Cross-Examine Experts

Another suggested method of enhancing the efficiency of the adjudicatory process is the use of experts to cross-examine expert witnesses.[152] This device is believed by its advocates to have a considerable time saving potential by permitting the experts to identify their areas of agreement and disagreement rapidly through direct interchange without the cumbersome process of filtration through attorney intermediaries. While appealing in theory, such a result is questionable in practice. Three major factors form the basis for skepticism. First, when an attorney has a specific purpose in cross-examining an expert witness, the questions proposed by his or her client's expert must be "filtered" to cull out lengthy and complex questions designed only to elicit the existence of subtle and esoteric differences of opinion. From the point of view of the scientist, such differences of opinion may be important and intriguing, but from a legal standpoint the question's relationship to the outcome of the case too often is tenuous or even nonexistent. Second, channelling questions through the lawyer frequently is necessary to keep the discourse between experts on a level that can be understood by the ALJ, the Commissioners, and reviewing

151. A recent appellate court decision indicates that the legality of a particular set of curtailment priorities may depend critically upon the method chosen by the Commission to implement those priorities. North Carolina v. FERC, 584 F.2d 1003 (D.C. Cir. 1978). *But see* Department of Energy Organization Act, Pub. L. No. 95-91, § 402(a)(1)(E), 91 Stat. 565, 583-84 (1977) (dividing the priority and implementation decisions between FERC and DOE).

152. *See* Miller, *Regulators and Experts: A Modest Proposal*, REGULATION Nov./Dec. 1977, at 36; Wald, *Reflections on Administrative Hearings*, PUB. UTIL. FORT., June 8, 1978, at 20.

courts. The effective lawyer acts largely as a translator in presenting and cross-examining experts, a role that many experts either are unable or unwilling to fill and that many decisionmakers desperately need. Third, the professional expert witness is as capable as any lawyer of mastering the skills necessary to confuse, obscure, and protract consideration of a technical issue on cross-examination when such is in the client's interest.

Discrete Limits on Cross-Examination

Another suggestion frequently made is to adopt rules strictly limiting cross-examination, either by forcing all parties opposed to the witness' point of view to consolidate their cross through one attorney or by prohibiting all re-cross.[153] If combined with consistent denial of motions to defer cross of a witness until counsel have had further opportunity to agree on cross, forced pooling of cross almost certainly would save hearing time. Suggestions for greater use of this mechanism, however, underestimate its cost in terms of sacrifices to the truth-seeking function.

Essentially, forced pooling of cross is merely an attempt to transform a polycentric proceeding into the more easily accommodated classic bipolar confrontation, but the proceeding remains polycentric in the sense that many more than two positions on the issues addressed by the witness exist. As a result, the position of many of the parties who oppose one or more aspects of the witness' testimony simply are not reflected in singular cross-examination of that witness, leaving the decisionmaker with an impression of the witness' testimony after cross that is both misleading and incomplete.[154] In short, a curtailment pro-

153. *See, e.g.*, Hamilton, *Rulemaking on a Record by the Food & Drug Administration*, 50 TEX. L. REV. 1132, 1167-70 (1972).

154. The inherent weaknesses in forcing pooled cross-examination can be seen by analyzing two aspects of curtailment proceedings: the basis for the wide variety of positions taken in the case and the natural incentives for voluntary pooling of cross-examination. Nearly every party to a curtailment proceeding takes a different position. The position taken by a distributor-customer will depend upon such pertinent characteristics as its mix of consumer end uses, the products manufactured by its major customers, the distributor's size, the amount of storage facilities to which it has access, whether it is solely a gas distributor or serves the same area with electricity as well, whether it is a partial or full requirements customer, its corporate philosophy on load growth, the positions it has taken in other proceedings, the impact of various curtailment plans upon its corporate affiliates, the weather patterns that prevail in the distributor's operating area, and like factors. A consumer party's position is shaped by a similar wide range of factors, including its end use of gas, the products it manufacturers, the expected short- and long-term impacts of various plans on its distributor supplies, the sensitivity of its operations to the price of energy, its overall corporate philosophy and positions taken on related issues, the anticipated effect of an FPC-or-

ceeding is not a bipolar controversy; it is a proceeding in which, for complex reasons, a hundred or more very different positions are taken. There is no apparent difference between forcing pooled cross of the typical multi-issue witness in this circumstance and reversing twenty years of precedent on standing to intervene. The latter would also simplify polycentric proceedings by recasting them in their old bipolar mold, but it is an efficiency-enhancing option considered and consistently rejected by courts and commentators for excellent reasons.[155]

In addition, there is good reason to believe that pooled cross (and even pooled sponsoring of witnesses) already occurs voluntarily in curtailment cases to the maximum extent feasible consistent with any notion of permitting effective participation by parties with differing interests. The incentive for parties to pool their efforts in cases of this type is enormous. A client facing the prospect of spending over a quarter of a million dollars for separate representation at a curtailment hearing has a very strong incentive to cut costs by pooling efforts with other parties from time to time or even by instructing its lawyers to participate actively only on a few issues. Thus, if several different parties request an opportunity to cross-examine a witness through separate counsel, a fair inference may be drawn that each party has concluded that its interests in cross-examining the witness and the points it desires to bring out on cross-examination differ materially from those of the other parties requesting cross. In this situation, the analogy between denying a right to separate cross and outright denial of intervention appears very close indeed.

The effect of prohibiting re-cross is less clear, in terms of both its advantages and its disadvantages. A witness is cross-examined initially by a dozen lawyers, each of whom asks a few questions. As a result of responses elicited by the first round of cross, however, several lawyers may request further cross that may be considerably more extensive than their initial cross. This process can continue through several rounds of cross, with the result that a witness who was expected by all participants to be off the stand in a few hours sometimes requires several days of hearing time. While this undoubtedly can be a substantial problem, it is not clear that prohibiting re-cross will save a substantial

dered curtailment plan on the future actions of the state commissions that directly control deliveries of gas to its plants, and like factors. Of course, the basis for the position taken by a state utility commission party is even more complex, taking into account the disparite interests of all consumers and distributors in the state.

155. *See generally* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1723-56 (1975).

amount of hearing time without simultaneously impairing the effectiveness of the hearing process as a mechanism for seeking truth.

Like multiparty cross, re-cross is an inevitable characteristic of the polycentric proceeding. It occurs most often in one of two situations: when the testimony of the witness taken as a whole is garbled after the initial round of cross-examination, or when a cross-examination successfully has transformed another party's witness into a forceful advocate of the cross-examiner's position. In the first situation, the witness probably has become confused in the course of interrogation and has made one or more statements that are either untrue or do not reflect his or her opinion. Alternatively, the witness' statements may be internally consistent but based upon unarticulated premises. In either case, re-cross can make a substantial contribution toward clarification. In the second situation, denial of re-cross is functionally equivalent to denying cross-examination of a witness' direct testimony.[156] Thus, whatever promise rigid restrictions on cross might offer in other types of regulatory proceedings, their value as a means of shortening polycentric energy policy litigation must be balanced against a very high cost in reduced effectiveness of the hearing process.

Relaxing the Rules of Evidence

One method of reducing the length of hearings is to relax some of the rules of evidence, particularly the hearsay rule.[157] The FPC already has relied upon some hearsay evidence in curtailment cases; its successor, the FERC, will be tempted to do so even more if it ever wants to clear its docket of a growing backlog of curtailment proceedings and other types of complex litigation.[158]

156. One of the most effective tactics available in polycentric cases is to take a witness who is appearing principally to support a position of a client on one issue, but who tangentially mentions another issue, and turn the witness into a strong advocate of your client's position on the second issue through cross-examination. The tactical advantages of this type of successful co-opting are enormous. The opposition on the second issue (which typically does not include the client on whose behalf the witness is testifying) is often caught off guard, and the testimony of the witness on the second issue has enhanced credibility by virtue of the fact that the witness has no relationship with the party whose position on the issue he or she has chosen to advocate on cross. There is no effective way of avoiding the co-opting of witnesses on cross and, once it occurs, prohibiting other parties from attempting to erode the witness' testimony through further cross could impose a serious handicap on the decisionmaker.

157. To some extent, at least, hearsay is admissible in administrative adjudications and can form the basis for an agency finding of fact. *See* Richardson v. Perales, 402 U.S. 389 (1971).

158. The Commission's rules do not exclude hearsay evidence per se but do exclude

When the FPC initially decided to rely upon end use as a major criterion for allocating scarce gas supplies, most interstate pipelines immediately began gathering end use data. Each distributor customer was instructed to send its customers a questionnaire to obtain the necessary data on end use.[159] When the curtailment hearing took place, the data obtained through this process was introduced into evidence either through a witness for the pipeline or through witnesses for each distributor. Of course, in either form the data was hearsay, and requests to cross-examine a witness with firsthand knowledge of the basis for classifying gas requirements usually were denied.[160] As a result, many years undoubtedly were eliminated from the hearing process. Moreover, such heavy reliance upon hearsay evidence in the early stage of gathering end use data may not have interfered with the effectiveness of the decisionmaking process to an intolerable extent. To be sure, many end uses could have been misclassified as a result of misinterpretation of FPC's definitions or the instructions accompanying the questionnaires. At the time the original end use data was collected, the vast majority of people involved in the data collection process did not understand the implications of the data they were collecting and submitting. Thus, while a great many errors of inadvertence were committed in this process and were never corrected because of the introduction of the data in hearsay form, the data rarely was distorted by intentional misreporting. In those circumstances, admission of the hearsay end use data in evidence and its use as the basis for implementing curtailment plans probably was defensible based upon acceptable hearsay policy analysis.[161]

The Commission will be under even greater pressure to rely upon hearsay in future curtailment cases, notwithstanding that future hearsay offered in evidence may not be accompanied by the indicia of reliability associated with the original end use data.[162] Under current

"such evidence as is not of the kind which would affect reasonable and fair-minded men in the conduct of their daily affairs," 18 C.F.R. § 1.26(a) (1978).

159. *See* City of Wilcox v. FPC, 567 F.2d 394, 420 (1977).

160. *See* Texas E. Transmission Corp., No. RP 71-130 (1978) (Initial Decision on Remanded Issues). *See also* City of Wilcox v. FPC, 567 F.2d 394, 420-21 (1977).

161. *See generally* Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974).

162. In North Carolina v. FERC, 584 F.2d 1003 (D.C. Cir. 1978), the court held unlawful a curtailment plan ordered into effect by the Commission on the Transcontinental Gas Pipe Line Corporation system. The Commission was ordered to conduct further proceedings, but was permitted to retain the original plan in effect "for a reasonable period of time" while conducting the further proceedings. *Id.* at 1017. The proceedings required by the court include the compilation of new end use data reflecting the current conditions in the markets served by the pipeline and the actual present and future impact on those markets of

circumstances parties involved in the process of gathering and submitting end use data will have a strong incentive to deceive by selecting the basis for reporting most favorable to them, exaggerating the consequences of curtailment plans they oppose, and even asserting outright falsehoods. Moreover, the highly favorable treatment received by the few who were less than candid in reporting their end use data initially[163] has had an indelible effect upon the many who have suffered for years as a result of their initial candor. Consequently, the agency will find itself on the horns of a dilemma. One option is to accept the impact data in hearsay form from witnesses whose knowledge of the basis on which data was reported by consumers is too limited to uncover instances of false reporting through cross-examination, thereby allowing the biggest liar to win by default. The other option is for the agency to force witnesses from each of the thousands of facilities in twelve states which, for example, receive gas from Transcontinental Pipeline, to appear and be cross-examined concerning the basis for the end use and impact data provided by each. The latter choice is obviously out of the question.

Furthermore, the Commission may be forced to accept the current impact data on a double hearsay basis, that is, through a witness from the pipeline whose knowledge will be limited to the data as compiled by the distributors. This would open another major avenue for distortion of the data, as there are many ways in which distributors can misreport or skew end use and impact data in their favor, and each would have every incentive to do so.

In sum, further relaxation of the hearsay rule has considerable potential for saving hearing time, but it also creates enormous potential for mischief. In addition to the direct costs to the effectiveness and accuracy of the decisionmaking process, increased reliance upon hearsay in circumstances in which the declarant has a clear incentive to falsify or mislead at the expense of another party may have societal costs of much greater proportion.

any curtailment plan adopted. *Id.* at 1010-15. Thus, the Commission must begin by compiling all new end use data, but under circumstances dramatically different from those that prevailed when the original data was gathered.

163. Even if an error in priority classification based upon false reporting of end use data is detected in the hearing process, it usually is not corrected until the Commission issues its decision on the merits in the proceeding. In the intervening years, the party who submitted false end use data receives the benefits of an undeserved high-priority curtailment classification. *See generally* S. HERMAN, R. PIERCE, M. TROPIN & B. TYREE, NATURAL GAS USERS' HANDBOOK 20-23 (1976).

Greater Use of Discovery

One group of critics contends that the unavailability of discovery is at the root of the problem of delay in regulatory adjudication.[164] The theory is that much of the cross-examination that takes place at any agency hearing is of the broad probing type which normally would occur during pretrial depositions, and allowing and encouraging pretrial discovery devices would reduce the amount of hearing time required by permitting counsel to narrow the issues in advance.

The Commission's Rules of Practice and Procedure make available some discovery devices, including depositions,[165] but formal discovery rarely takes place. Informal discovery mechanisms, however, are used extensively. First, and perhaps most important, all direct testimony and exhibits must be filed and copies served upon all parties in advance of the date on which cross-examination takes place.[166] This advance service of canned direct testimony fills the most important role typically performed by discovery in court litigation. Second, informal data requests, both written and oral, commonly are employed as discovery devices in Commission proceedings. Despite their availability the benefits offered by depositions are limited severely by the practical problems inherent in conducting a deposition session with 100 or more parties participating. Perhaps greater use of discovery could assist in expediting regulatory adjudication, but there is little reason to expect that any appreciable shortening of proceedings would result.

Imposing Limits on the Duration of the Proceeding

One approach to the problem of delay in agency adjudication is simply to limit the amount of time an agency or judge can take to issue a decision in a proceeding. Much of the legislation passed by Congress in recent years establishing new agencies or modifying the statutory authority of existing agencies contains provisions mandating certain agency decisions within a specific time period.[167]

When imposed by a body as remote from the administrative process as Congress, and when cast in the permanent structure of a statute, rigid time limits on adjudicatory decisions are certain to cause more

164. *See, e.g.*, Hamilton, *Rulemaking on a Record by the Food & Drug Administration*, 50 TEX. L. REV. 1132, 1170-75 (1972); Testimony of Seymour Wenner before the Senate Committee on Government Operations, *reprinted in* REGULATORY DELAY, *supra* note 7, at 175-220.

165. 18 C.F.R. § 1.24 (1978).

166. *See* 18 C.F.R. § 1.26, at 35 (1978).

167. *See* 43 Fed. Reg. 27,509 (1978).

problems than they solve. Tasks such as an impact evaluation could be accomplished in arbitrarily short periods only through total sacrifice of the truth-seeking goal of adjudication.[168] Moreover, decisional deadlines necessarily force agencies to place priorities on those cases subject to decisional deadlines at the expense of progress in other cases. Finally, the circumstances justifying a priority effort in one class of cases at the time Congress acts are likely to change to such an extent over the years that the priority system becomes totally irrational. For instance, the Natural Gas Act contains a provision requiring the agency to give priority to pipeline rate cases over all other types of cases.[169] This priority system undoubtedly seemed appropriate when the Act was passed in 1938, but few support it today. Even the pipeline companies probably would agree that certificate cases involving proposed new gas supplies should be given priority.

Decisional deadlines can be imposed by authorities other than Congress. Occasionally, appellate courts have imposed decisional deadlines on agencies under the Administrative Procedure Act (APA),[170] but, for good reason, have taken this type of action only when faced with the most egregious examples of dilatory agency procedure.[171] Likewise, few agencies have imposed blanket time limits, or even time limits on certain types of cases on ALJs.[172] Others, including the FPC, have imposed deadlines on ALJ decisionmaking in specific cases. A good case can be made for this means of encouraging an expedited adjudicatory process. The agency is close enough to the problems involved in adjudicating the various types of cases before it to tailor its deadlines to the realities of the process. Unlike Congress, the agency can change its priorities rapidly to reflect changing needs in the regulatory situation. The agency also has the flexibility to extend a deadline when, due to unforeseen problems, meeting the original deadline is likely to diminish the effectiveness of the process.

Perhaps the most significant time-shortening tools are those peculiarly within the reach of the administrative law judge. Examples are the imposition of time limits on a party's presentation of its direct case and on its cross-examination. Most of these tools would be useless in the hands of anyone but the ALJ because they are subject to potential

168. *See* International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).
169. 15 U.S.C. § 717c(e) (1976).
170. *See* 5 U.S.C. § 706(1) (1976).
171. *See, e.g.*, Buckeye Cablevision, Inc. v. United States, 438 F.2d 948, 949-53 (6th Cir. 1971).
172. *See generally* REGULATORY DELAY, *supra* note 7, at 132-42.

abuse unless wielded by a person who can observe their impact impartially and directly. The judge can impose such a limit and avoid abuses by extending the time for cross when it appears that the witness or the witness' counsel have been the cause of delay or when it is evident that important facts remain to be covered in spite of due diligence on the part of counsel.

Undoubtedly, the most effective device uniquely available to the ALJ is plain old hard-nosed treatment of counsel. Setting strict time tables, refusing to admit cumulative evidence, refusing to grant extensions of time, lengthening hearing hours, and just plain bullying counsel into being more selective in their interrogation of witnesses can expedite proceedings quite effectively. When the FPC discovered that several of the major curtailment proceedings were languishing in a state of almost total dormancy, it imposed decisional limits on the ALJs responsible for the cases, with good results. The deadlines were met with no detectable sacrifice of the effectiveness of the adjudicatory process.

Without decisional deadlines, ALJs have no incentive to expedite hearings and considerable incentive to permit counsel to set the pace of the proceeding. An ALJ rarely will be reversed for accepting cumulative evidence or for granting a motion for extension of time, but he or she is exposed to a real risk of reversal for refusing to accept evidence or for denying a motion for extension of time.

Imposing decisional deadlines on ALJs cannot be considered entirely cost and risk free. The risk of error by all participants undoubtedly is increased when severe time pressures are imposed, and the tools the ALJ must use to expedite the case can become machines for doing real harm to the adjudicatory process if wielded by a judge who is lacking in judicial temperament or wisdom. Moreover, there are broader costs which cannot be ignored. Other cases for which the ALJ is responsible necessarily are neglected and there is a dramatic increase in stress for all participants. This higher stress level will be reflected in higher fees for the privately retained participants and either higher salaries for participants employed by the government or an inability to attract and retain high quality personnel. Still, of all the devices available to contract regulatory proceedings, imposing decisional deadlines on ALJs seems to offer the greatest promise for significant reductions in hearing time without corresponding reductions in accuracy and effectiveness.

Putting Procedural Expedition of Regulatory Adjudication in Context

The foregoing analysis suggests that only one proposed method of reducing the length of time required to adjudicate polycentric energy cases has any real potential to further that goal without simultaneously sacrificing the effectiveness of the adjudicatory process, and that method—agency imposition of decisional deadlines on ALJs—can be expected to produce only limited progress. Although greater use of generic hearings would decrease the direct costs of adjudication, it would be likely to increase the indirect costs associated with delay and uncertainty. Moreover, its utility is limited to issues on which generalization and standardization of rules is more important than tailoring rules to specific factual situations. Two other proposals, cross-examination of experts by experts and more precise notice of issues combined with issue-oriented phasing of proceedings, offer little hope for contracting the adjudicatory process; indeed, the latter has proven in practice to lengthen the process substantially. Finally, imposing rigid limits on cross and further relaxing the hearsay rule would result in detriments far outweighing the possible benefits.

One ultimate consideration is whether the "adjudicatory" process resulting from adoption of these proposed solutions would so distort the paradigm of judicial adjudication of bipolar disputes on which it is based that continued reference to the paradigm ceases to be of value. Even without the interjection of significant efficiency-enhancing compromises to the adjudicatory process, the nature of polycentric cases and the incredible workload confronting agencies with regulatory responsibility over the energy industry have caused marked departures from the judicial paradigm.

The first departure from the judicial paradigm is found in the role of the presiding judge. The ALJ who issues the initial decision in a polycentric case is unlikely to have heard all the evidence in the case. The proceedings last so long that retirements, transfers, resignations, illnesses, and reassignments of cases take a significant toll of ALJs. Most curtailment cases have been presided over by at least two ALJs, and often the ALJ who writes the decision has presided over only a small portion of the hearings.[173] Moreover, the ALJs' findings and conclusions are not binding upon the Commission and in fact appear to receive little deference from the Commission. Thus, the concept of the

173. For instance, five ALJ's have presided over the hearings conducted to date in one curtailment proceeding. *See* Panhandle E. Pipeline Co., [1976] UTIL. L. REP. (CCH) ¶ 11,779, at 13,681.

judge being uniquely qualified to make many substantive decisions because of his or her knowledge of the record and opportunity to observe the witnesses does not fit the realities of polycentric agency adjudication.

Second, the assumption that the decisionmaker is fully familiar with the evidence,[174] however much alive it may be in theory, died long ago in regulatory practice. It stretches credibility beyond all reasonable bounds to assume that five Commissioners, whose activities and responsibilities extend well beyond issuing decisions in adjudicatory proceedings,[175] read the scores of thousands of pages of transcript and hundreds of voluminous exhibits accepted in evidence in any one curtailment proceeding. Indeed, with 50 to 200 briefs filed at each stage of each major proceeding, totaling in excess of 1,000 pages, it is highly unlikely that the Commissioners can even fully read the briefs submitted in a complex adjudicatory proceeding.

As a practical matter, there are only two basic ways in which an agency placed in this type of situation can make decisions in adjudicatory proceedings. The Commissioners can delegate most or all of the decisionmaking function to unidentified agency employees who also are unlikely to read the record of the proceeding, but probably could read the briefs and refer to the record on some issues, or they can retain the theoretical decisionmaking function but delegate to agency employees the task of reading and summarizing the briefs and whatever part of the record the employees can manage to digest in the time available. The differences between these two options probably are less practical than theoretical, as the employees who are assigned the job of reading and summarizing the briefs and record can influence the outcome of the proceeding significantly by selectivity and emphasis in the summarizing process. The most likely candidates for either assignment are the legal assistants to the Commissioners, typically recent law school graduates with little knowledge of the industry regulated by the agency.

Consequently, even without further compromises, regulatory adju-

174. In Morgan v. United States, 298 U.S. 468 (1935), the Court held that agency findings of fact can only be made by agency decisionmakers who have at least read the evidentiary record compiled through required hearings.

175. Among the more important obligations of regulatory agency decisionmakers is testifying before congressional committees. Realistically, agency decisionmakers probably spend more time preparing for, and appearing at, oversight and legislative hearings than they spend on any aspect of agency decisionmaking. For instance, in one 15-month period, the Chairman of the FPC or one of his key aides was required to testify before congressional committees on 77 separate occasions—an average of one appearance every six calendar days. *See* [1976] F.P.C. ANN REP. 55-56.

dication of polycentric controversies has few of the positive attributes of the bipolar judicial proceeding on which it is modeled. If one accepts the need for further compromises that inevitably will impair the effectiveness of the truth-seeking function of adjudication, the question must be raised whether there is enough value remaining in this distortion of the judicial paradigm to justify its retention in this context. At the very least, the consequent reduction in the truth-finding effectiveness of adjudication establishes the need to explore the potential inherent in other procedures for formulating and implementing energy policy.

Use of Informal Rulemaking

At the other end of the procedural spectrum from adjudication lies informal rulemaking. Under section 4 of the Administrative Procedure Act,[176] an agency can adopt a "rule" without conducting any adjudicatory procedures; the agency need only provide notice of the proposed rule or the subjects and issues to be addressed by the rule, along with an opportunity to present data and comments concerning the proposed rule. Then the agency need only include, in conjunction with the rule ultimately adopted, a concise general statement of its nature and basis.[177]

The extent to which energy regulatory agencies have discretion to use informal rulemaking is discussed at length below.[178] For purposes of analyzing the drawbacks of informal rulemaking for the formulation and implementation of energy policy, however, informal rulemaking can be assumed to be an available option in all polycentric disputes, specifically including proceedings involving decisions on curtailment or allocations, rate level, rate design, and licensing or certification.

Substituting informal rulemaking for adjudication obviously would reduce both the direct transactions costs inherent in the decisionmaking process and the time required to formulate and implement policies.[179] The latter, in turn, would reduce the indirect costs associated with the decisionmaking process by reducing investor uncertainty concerning future policies.[180] These effects are illustrated by FEA regula-

176. The Administrative Procedure Act was first enacted by Act of June 11, 1946, ch. 324, 60 Stat. 237 (1946). This Act was later repealed as part of a general revision and its provisions reenacted by Pub. L. No. 89-554, 80 Stat. 381 (1966).

177. 5 U.S.C. § 553 (1976).

178. See text accompanying notes 245-407 *infra*.

179. *See* REGULATORY DELAY, supra note 7, at 26-32.

180. See text accompanying notes 108-26 *supra*.

tion of the pricing and allocation of petroleum products. The FEA acted almost exclusively through informal rulemaking. Typically, the agency issued a notice of proposed rulemaking, outlining its reasons for proposing the rules;[181] allowed a brief period for submission of comments; and then issued the final rules, accompanied by a synopsis of its reasons for adopting the final rules, all within a few months.[182] Implementation of the rules was immediate because at least in theory they were self-effectuating. Fact findings necessary for proper implementation were made through one of two mechanisms. Either the party subject to the rules made its own findings in the process of applying the rules to its situation, subject to error detection by an FEA auditor, or the agency itself conducted fact finding in acting upon a request for relief based upon those facts already available to the agency. At no point was an adjudicatory proceeding provided.

The Effectiveness of Informal Rulemaking

The principal disadvantage inherent in informal rulemaking is, of course, the practical inability to determine the factual predicates for the agency's action. Classic informal rulemaking may never reveal the assumed pattern of facts upon which a policy decision is based. Even the *source* of many of the facts relied upon in applying a rule to a particular situation may remain hidden. Failure to disclose the factual basis for an agency decision precludes many checks upon agency action useful in assuring that the agency acts on the basis of reliable data, does not discriminate among the members of regulated groups, and acts within substantive statutory and constitutional limits.

Potential For Agency Decisions to be Based Upon Poor Data or Methodology

The agency's own personnel, sometimes supplemented by consultants, and the information submitted in the comments of interested members of the public are two principal sources of information available to an agency in informal rulemaking. Neither source is very reliable in the context of informal rulemaking. A third source often relied upon by regulatory agencies, data obtained ex parte from affected members of the public, has unique dangers of unreliability which warrant consideration after the other two sources are analyzed.[183]

With no opportunity for outside parties to test the data and meth-

181. 38 Fed. Reg. 34,414 (1974) (proposed by Federal Energy Office).
182. 39 Fed. Reg. 1,924 (1974).
183. See text accompanying note 190 *infra*.

odology relied upon by the agency's staff, there is a greater likelihood of agency action based upon erroneous data. A few examples of the potential for poorly informed decisionmaking in such circumstances, many of which, ironically, are extracted from the records of adjudicatory proceedings, will illustrate the point.[184]

In a proceeding in which the Commission was required to decide on the appropriateness of a particular site for a liquified natural gas terminal,[185] the staff opposed the site proposed by the applicant in part because of a staff member's contention that there was an active seismic fault at the site. Cross-examination of that staff member, whose information formed the sole basis for the staff concern over seismic safety, revealed that the witness had a bachelor's degree in geology and had taken only one or two courses that touched upon seismology. His opinion was formed solely on the basis of an airplane flight over the site on a cloudy day. The applicant's witness, who had inspected the site on the ground, had a doctorate in seismology and twenty years of field experience. Although the agency still had to resolve a question of fact, the information on professional qualifications elicited through cross-examination provided both the agency and reviewing courts with a better basis for deciding the issue. A proceeding handled through informal rulemaking would have been unlikely to disclose this information to the agency decisionmaker, and even less so to the reviewing courts.

Another example was a proceeding in which the agency was required to determine the proper metallurgical specifications for steel to be used in constructing a chilled gas pipeline.[186] The agency's staff maintained that the industry-proposed standards were totally inadequate and likely to result in the pipeline shattering like glass. At a hearing, the staff consultant, a distinguished professor of metallurgical engineering, testified that the type of steel proposed by the industry was too brittle to be suitable under the proposed conditions of use. On cross-examination, however, counsel representing industry members

184. The reason for the use of adjudicatory proceedings to illustrate the potential dangers of relying upon informal decisionmaking procedures is inherent in the nature of informal rulemaking: the data relied upon by the agency, and its source, usually make it impossible to determine the reliability of such data even after the fact. It is also necessary to depart from curtailment proceedings in order to illustrate the dangers of relying upon data provided by sources within the agency, since the FPC staff declined to offer evidence in most curtailment cases.

185. This example was obtained from the transcript of El Paso Alaska Co., No. CP 75-96.

186. This example was obtained from the transcript of El Paso Alaska Co., No. CP 75-96.

were able to demonstrate that the witness misunderstood the conditions in which the pipe was proposed to be used, and that the consultant had little familiarity with the cold-rolled steel used in cryogenic pipeline applications. The industry members then offered the testimony of three experienced cryogenic steel metallurgists and letters from the major steel manufacturers of four countries explaining that the brittle fracture problem alluded to by the staff witness had been solved definitively over a decade ago. Other flaws in the staff witness' testimony were revealed as well. This testimony effectively resolved the issue, yet the use of informal rulemaking likely would have left undetected the fundamentally incorrect basis for the staff proposal.

Adjudicatory proceedings greatly increase the potential to expose at least a fair proportion of those agency staff proposals based upon demonstrably fragile or even false factual predicates. One can only speculate on the number of agency proposals with similarly weak or nonexistent factual and theoretical foundations that find their way into the Code of Federal Regulations through the informal rulemaking process. While this potential could be reduced by increased funding and more careful scrutiny of the qualifications of agency staff personnel, to expect regulatory agencies to have access as required to equipment, materials, and personnel whose qualifications are well-suited to every issue that comes before the agency is highly unrealistic. To the extent they do not, informal rulemaking maximizes the risk of poor policy decisions.

A particular problem exists in the increasing agency reliance upon mathematical models using various methodologies, including regression analysis, econometrics, cost benefit analysis, and discounted cash flow. An agency engaged in informal rulemaking often does not disclose even the nature of the model used or the results of the calculations, and the specific methodology, statistical validity and reliability of the results, and sources of the input data rarely are revealed. This growing trend therefore opens still more avenues for errors by agency staff personnel.

Although other instances of significant flaws in mathematical models prepared by staff personnel exist,[187] one example should suffice

187. A second example was obtained from Professor Thomas McGarity, formerly a Staff Attorney at the Environmental Protection Agency. The problem arose in the context of a nonadjudicatory proceeding to permit the marketing of a new pesticide. On the issue of safety, an agency staff scientist submitted a report recommending approval of the pesticide and stating that his calculations showed that the carcinogenic potential of the pesticide was very low, with only twenty-four people predicted to contract cancer over a seventy year

to demonstrate the potential impact of the problem. In a recent proceeding,[188] the FPC staff proposed that one of three alternative pipeline projects be approved, based in part upon the calculations of a staff economist who concluded that the project would yield net economic benefits to the United States several billion dollars greater than those an alternative could provide. Cross-examination brought out several significant facts. First, the witness was forced to raise by several hundred dollars the economic benefits attributed to the allegedly low-benefit project, due to mathematical errors detected by the witness during his preparation for cross-examination. Second, the witness acknowledged his calculations were predicated upon the completion of the competing projects on the same timetable, although, in fact, one of the applicants contended that its project could be completed two years earlier than the others. The witness acknowledged that just a one-year shorter completion time would increase the economic benefits attributed to that project by approximately one billion dollars. Third, the comparative economic benefits of the three projects had been calculated on the assumption that the allegedly low benefit project would transport approximately two-thirds the volume of gas transported by the other two, a conclusion based upon the witness' confusion over the nature of the disputes between the competing applicants. This mistake accounted for somewhere between one and two billion dollars of the difference in the economic benefits attributed to the projects. Finally, the witness made available the capital costs and operating costs on which the calculations of comparative economic benefits were predicated, thereby revealing that the costs assumed in the staff model dif-

period. However, an agency lawyer with scientific training refused to forward the memorandum to the agency decisionmaker unless it was accompanied by a description of the methodology used and indications of the statistical validity and reliability of the estimate. Upon resubmission of the memorandum, the accompanying description of methodology and reliability showed the original estimate to have been derived through the use of regression analysis and that, using one standard form of measuring the reliability of such an estimate, there was a 95% probability that the actual incidence of cancer resulting from use of the pesticide would be between zero and 660,000 cases. At the time this Article was written, the application to use the pesticide was still pending, but there is no reason to doubt that the information concerning the methodology and reliability of the original estimate of the pesticide's carcinogenic potential will play a major role in the agency's decision. In this case, a poorly-informed agency decision was averted by unusually alert staff work. The operative word, however, is "unusual." Given that informal rulemaking provides no procedures to assist the decisionmaker in understanding staff calculations, this situation only would be acceptable if such actions by agency staff personnel were the result of normal procedures rather than exceptional conduct.

188. This example was obtained from the transcript of El Paso Alaska Co., No. CP 75-96.

fered from all other cost estimates previously provided by staff or the applicants. The ultimate result was an agency decision that the project identified as inferior to the other two projects by several billion dollars was actually the economically preferable project. If informal rulemaking had been employed, the probability is high that the significant infirmities in the mathematical data provided to the agency by its staff would have gone undetected, and the agency would have acted contrary to its final determination.

Of course, the agency that uses informal rulemaking is not limited to information originating within its staff. It can and must allow interested members of the public to provide data and comments concerning the agency's proposal. Such comments theoretically can perform at least three functions. First, they can assist the agency in shaping its rules by pointing out problems in the implementation of the proposal the agency previously had not considered. Second, comments provide outside parties an opportunity to criticize the stated basis for the agency proposal. Third, outside parties themselves can submit factual, opinion, and analytical data supporting an alternative to the agency's proposal or demonstrating that the agency's proposal would have unexpected results.

In practice, comments usually are effective only at fulfilling the first function. Comments in an informal rulemaking rarely provide a meaningful opportunity to point out flaws in the basis for the proposal as a result of the ordinarily skimpy and generalized agency statement of basis and the insufficient time for discovery and analysis of the detailed basis for the proposal. Comments are also of very limited value as an independent source of information. As with comparable information originating from internal sources, there is no way to test the accuracy of the data, to determine the qualifications of the individual who provided or prepared the data, or to probe the methodology used. Moreover, in the typical thirty day comment period, often less in the case of FEA proposals,[189] outside parties reasonably cannot be expected to assemble a fully qualified team to read and understand a complex agency proposal, determine (largely by inference) its scientific basis, and then demonstrate the flaws in that proposal or support an alternative action proposed by the outside party. Usually, comments in informal rulemakings are written under considerable time pressure, by lawyers unqualified to prepare detailed comments demonstrating the infirmities of the proposal by applying reliable scientific methodology

189. See notes 347-49 & accompanying text *infra*.

to the appropriate facts. Comments in informal rulemakings are notorious for mistatements of fact, legal hyperbole, and unsupported assertions, and do not comprise a reliable source of data upon which an agency can, or should, rely.

The final source of data an agency can call upon in informal rulemaking is information obtained from outside parties through channels other than comments. This is undoubtedly a useful major source for many agencies, including the old FEA and the new ERA. With the extreme time pressures and legal trappings of official comments removed, outside parties are more likely to be able to provide information, opinions, and projections that are accurate and based upon reliable methodology. There is, however, the very real possibility that such information will be distorted in favor of the private party's interests, and there is little chance such distortions will become known to agency decisionmakers. The possibility of revelation is further minimized when private parties with interests contrary to those of the party consulted by the agency are unaware of the consultation.[190]

In sum, the use of informal rulemaking procedures maximizes the potential for poorly informed decisionmaking by eliminating virtually all opportunities to discover the inevitable flaws, critical omissions, and limitations hidden within the data upon which agency decisions rely. Beyond this "passive" interference with decisionmaking, however, informal rulemaking possesses a substantial capacity for more active mischief.

Potential for Discrimination in Decisionmaking Based Upon Personal or Political Motivation

Because the factual and analytical predicates relied upon in informal rulemaking are often unclear and difficult to test or verify, agencies may act with relative ease for covert reasons quite different from those stated to be the official bases for the agency action. A particular problem is the potential to hide favors to those individuals and corporations politically aligned with the incumbent administration or with legislators able to exercise unique leverage over the agency. Energy regulatory actions obviously have a substantial economic and financial impact. When an agency decides to give a company access to a large quantity of natural gas or propane at prices well below market value, in

190. The ability of agencies to obtain information from *ex parte* sources in informal rulemaking has been partially eroded by Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). However, agencies apparently can continue to obtain information *ex parte* before initiating a rulemaking proceeding.

effect it tenders the company a bank draft for a large sum of money. The same is true of decisions on rate level, rate design, and even many licensing decisions. Consequently, the pressure for de facto decisions based upon pure political considerations becomes enormous. Some have suggested that politicizing of the administrative process follows inevitably from the demise of the delegation doctrine;[191] but surely there are sufficient political, moral, and equitable values at stake to justify efforts to limit such politicization. Yet extensive reliance upon informal procedures in the pervasive regulation of an industry, the value of whose product has a broad national impact, is a certain prescription for maximizing politicization, and consequent corruption, of the administrative process.

In this regard, however, a caveat is in order. Adjudicatory procedures also can mask political or personal favoritism. Adjudication does render such bias in substantive decisionmaking more difficult because of the requirement that the agency support each element of its decision with reference to the evidence in the record and the greater opportunity during proceedings to test that evidence. But political favoritism can be expressed easily enough by an agency relying upon adjudicatory procedures through its procedural decisions. For example, the agency can preserve the status quo almost indefinitely by finding issues on which it needs more evidence every time the case comes before it for decision.[192] Although a politically desirable, rapid change from the status quo is more difficult to effect, the agency nonetheless can order the proceeding expedited and thereby assure that it receives undeserved priority over other proceedings.

Potential Deviations from Constitutional or Statutory Decisionmaking Criteria

The practical inability to test the factual and analytical basis for an agency action taken by informal rulemaking also makes it much more difficult for reviewing courts to insure that the agency is employing the decisional criteria mandated by the Constitution and Congress. These criteria will receive greater discussion below;[193] however, criticizing on these grounds the use of informal rulemaking in most areas of energy regulation is questionable because, with a few notable exceptions, the

191. Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 778 (1975).

192. *See, e.g.*, Cities Serv. Gas Co., [1977] UTIL. L. REP. (CCH) ¶ 11,995, at 12,590-91 (requiring further hearings to obtain "updated information" before imposing a new curtailment plan).

193. See notes 245-352 & accompanying text *infra*.

nebulous constitutional and statutory standards for substantive decisionmaking provide little meaningful check on the agency's discretion.

The substantive constitutional standard most often invoked in energy regulation proceedings is the Fifth Amendment's prohibition against the taking of private property for public use without just compensation.[194] The taking clause has been narrowed so severely over the last few decades, however, that a colorable claim of its violation through regulatory action is extremely rare. Consistent with the taking clause, a regulatory agency can impose price constraints that substantially reduce the value of private property,[195] eliminate provisions of contracts and leases,[196] prohibit the most valuable uses of private property,[197] and require that property be transferred to a specified third party on terms mandated by the agency.[198] Not surprisingly, efforts to invoke the taking provision in appealing actions by federal energy regulatory agencies have met with uniform failure in recent years, without any serious inquiry into the factual or analytical basis for the agency action challenged.[199]

Nor do relevant statutory provisions establish meaningful standards to evaluate underlying facts and analysis. For example,[200] the

194. U.S. CONST. amend. V.

195. FPC v. Hope Natural Gas Co., 320 U.S. 591, 601 (1944); Western States Meat Packers Ass'n v. Dunlop, 482 F.2d 1401 (Temp. Emer. Ct. App. 1974).

196. California v. Southland Royalty Co., 436 U.S. 519 (1978).

197. United States v. Central Eureka Mining Co., 357 U.S. 155 (1958).

198. Condor Operating Co. v. Sawhill, 514 F.2d 351 (Temp. Emer. Ct. App. 1975).

199. *See, e.g.*, Cities Serv. Co. v. FEA, 529 F.2d 1016 (Temp. Emer. Ct. App. 1975), *cert. denied*, 426 U.S. 947 (1976); Condor Operating Co. v. Sawhill, 514 F.2d 351 (Temp. Emer. Ct. App. 1975).

200. Another example is found in the statutory standards applicable to most decisions regulating petroleum products. The ERA must make most pricing and allocation decisions with reference to a list of nine decisional criteria, 15 U.S.C. § 753(b)(1) (1976), varying from terms with an easily ascertainable specific content, such as "shall provide for . . . maintenance of . . . fishing activities," 15 U.S.C. § 753(b)(1)(C) (1976), to virtually meaningless phrases, like "shall provide for . . . equitable distribution . . . at equitable prices," 15 U.S.C. § 753(b)(1)(F) (1976). The agency is instructed to follow each decisional criterion "to the maximum extent practicable." 15 U.S.C. §§ 753(b)(1) (1976). Furthermore, since many of the nine separately stated criteria are conjunctive, ERA in fact must decide cases applying some thirty to forty decisional factors contained within the nine statutory provisions. Finally, the legislative history of the Petroleum Allocation Act, Pub. L. No. 93-159, 87 Stat. 629 (1973), indicates express congressional recognition that the decisional criteria are mutually inconsistent but expresses a clear congressional intent to leave the balancing of inconsistent criteria to the agency in every case. CONF. REP. No. 93-628, 93d Cong., 1st Sess. 14 (1973), *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2688-89. As a result, almost every agency action must further some criteria at the expense of others, thereby granting the agency almost total de facto discretion in its substantive decisionmaking in most areas, quite independent of the factual or analytical underpinnings of its decisions. *See, e.g.*, Consumers

FERC must act under three basic standards established by the Natural Gas Act (NGA) and Federal Power Act (FPA): rates, terms, and conditions of service must be "just and reasonable" and not "unduly discriminatory,"[201] and actions proposed by companies regulated by the Commission can be approved only if they would serve "the present or future public convenience or necessity."[202] These benchmarks have little intrinsic meaning beyond ordering the FERC to make good decisions and avoid bad decisions. The legislative history of the NGA and FPA are of little assistance in the majority of cases because most current issues were not anticipated by the legislature when the NGA and FPA were passed in 1938 and 1935, respectively. Past agency and court decisions have given these terms some meaning, but here again the context in which the terms must be applied today differs so greatly from the historical context of these interpretations that they provide little insight into the modern application of the standards.

Thus, unless Congress amends the organic acts governing federal agencies to provide meaningful decisional standards,[203] there is no room to argue that informal rulemaking impairs the ability of reviewing courts to conform agency action to constitutional and statutory standards. Therefore, attempts to strengthen informal procedures must focus upon the desire to insure a higher quality of decisionmaking and to reduce the potential for politically or personally based discrimination.

Methods of Increasing the Effectiveness of Informal Rulemaking

Having concluded that informal rulemaking avoids most of the high costs of using adjudication to resolve complex disputes in formulating and implementing energy policy, but only at a great sacrifice to the quality of regulatory decisionmaking, the next logical inquiry is whether informal rulemaking procedures may be modified to enhance the quality of decisionmaking while retaining the efficiency associated with informal procedures. Because the principal weakness of informal rulemaking lies in its inability to assure that agency decisionmakers

Union v. Sawhill, 525 F.2d 1068 (Temp. Emer. Ct. App. 1975); Cities Serv. Co. v. FEA, 529 F.2d 1016 (Temp. Emer. Ct. App. 1975). As might be expected, appellate courts rarely have reversed the ERA or its predecessor, the FEA, for failure to follow statutory decisional criteria.

201. 15 U.S.C. §§ 717c, 717d (1976); 16 U.S.C. §§ 105, 106 (1976).

202. 15 U.S.C.A. § 717f(e) (West Supp. 1979).

203. In at least a few areas of decisionmaking, recent legislation appears to substitute more meaningful standards. *See, e.g.*, Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (1978).

will understand the factual and analytical predicates for their decisions, the focus of efforts to improve the quality of results should be on mechanisms for exposing to public scrutiny and criticism the information and analysis relied upon by the agency.

Expanding the Concepts of Notice and Record in Informal Rulemaking

In several recent decisions, Judge Leventhal of the District of Columbia Circuit has forced agencies to expose the detailed factual and analytical bases for their proposed actions to affected members of the public in a manner that permits meaningful criticism, and to respond to any such criticisms that appear to have a factual and scientific foundation.[204] The results of this sequence then form the basis for court review of the agency's action. A good example is *Portland Cement Association v. Ruckelshaus*,[205] in which the EPA proposed a stationary source standard for new and modified Portland Cement plants. In the material made available to the public contemporaneously with its notice of proposed rulemaking, the EPA stated only that its proposal was "based on stationary source testing conducted by the Environmental Protection Agency and/or contractors . . . ."[206] The details of the tests and methodology employed were not revealed by the EPA until after the time for submitting comments on the proposal had passed, and the proposed standard was adopted by the agency over the objections of the industry. When the description of testing methodology finally was made available to affected members of the cement industry, a consulting engineer retained by the industry concluded in a detailed critique of the EPA's testing methodology that the results were "grossly erroneous" due to serious deficiencies in sampling techniques.[207] Because the rule already had been promulgated by the agency, the engineer's analysis and conclusions were submitted to the reviewing court rather than to the agency. The court remanded to the EPA for response to the engineer's criticism, but the agency chose only to reaffirm the original rule and add the engineer's comments to the record for review. The court reversed and remanded, holding:

> We find a critical defect in the decisionmaking process in arriving at the standard under review in the initial inability of petitioners to obtain—in timely fashion—the test results and procedures used on ex-

204. *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973). *See also* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977).

205. 486 F.2d 375 (D.C. Cir. 1973).

206. *Id.* at 392.

207. *Id.* at 393.

> isting plants which formed a partial basis for the emission control level adopted, and in the subsequent seeming refusal of the agency to respond to what seem to be legitimate problems with the methodology of these tests.[208]

Significantly, the court stated the basis for its action in terms of a broad principle of general applicability: "It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency."[209] The stated rationale for this principle was the requirement of APA section 4 that an agency engaged in informal rulemaking provide notice of the basis for its proposal prior to providing an opportunity for comment.[210] Although, as discussed below, Judge Leventhal's expansive reading of section 4 arguably is inconsistent with Justice Rehnquist's subsequent narrow interpretation in *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*,[211] it is assumed for purposes of analyzing the effectiveness of Judge Leventhal's expanded notice concept that where an agency's proposed rule is based upon factual and scientific considerations, appellate courts have the power to impose requirements of the type imposed in *Portland Cement*.

Several types of information are indispensable to any effort to criticize or review the adequacy of an agency proposal predicated upon scientific analysis of facts. First, of course, are the results of any studies, experiments, mathematical models, or other analyses on which the agency based its proposal. In cases exemplified by the facts in *Portland Cement*, even this information is not made available before the time for filing comments expires. Even when obtained, the results in themselves are not sufficient to permit meaningful evaluation and scrutiny. Other essential information includes the names and qualifications of the individuals who performed the work for the agency, a description of the methodology used, identification of the sources of input data, a description of the statistical validity and reliability of the results of any calculations,[212] and sensitivity data showing the extent to which the results

208. *Id.* at 392.

209. *Id.* at 393.

210. *Id.* at 393 n.67.

211. 435 U.S. 519 (1978).

212. The validity and reliability of the results of virtually any form of statistical analysis or mathematical calculation can be expressed with reference to a few well-known and generally accepted parameters. For instance, the reliability of the results of linear regression analysis is commonly expressed in the form of the standard error of the estimated coefficient, the t statistic, confidence intervals, and the coefficient of determination. *See* D. SJOQUIST, L. SCHROEDER & P. STEPHAN, INTERPRETING LINEAR REGRESSION ANALYSIS: A HEURISTIC APPROACH (1974).

of the calculations would change with various changes in input data. Depending upon the nature of the agency's methodology, reference to computer programs, mathematical formulae, and other calculational aids used by the agency staff also may be necessary.[213]

Before *Portland Cement*, such data, although in theory readily accessible within the agency, rarely was made available to the public, reviewing courts, or even the responsible agency officials at the time a rule was proposed. Requiring that this data be made public in a timely manner in informal rulemaking proceedings could work marked improvements in the quality of agency decisionmaking with very little reduction in efficiency. Indeed, conceivably the quality of agency decisionmaking in polycentric disputes could exceed that of cumbersome adjudicatory proceedings, hampered as they are by unwieldly records, buried evidence, tangentially related material, and lengthy debates between witnesses and counsel.[214]

Significantly, the preceding analysis does not address the issue of how courts should review the record compiled through the exposure/criticism/response process required in *Portland Cement*. At this point, Judge Bazelon's complaint that courts lack the technical expertise required to review in depth the substance of many regulatory decisions seems persuasive.[215] Short of in depth judicial scrutiny, Judge

213. For a more comprehensive discussion of the record required for meaningful review of agency action taken through informal rulemaking, see Pederson, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975).

214. A recent interchange between two scholars illustrates by analogy both the dangers of permitting agencies to act on the basis of undisclosed data and methodology and how agency decisionmakers and reviewing courts may be educated by timely public disclosure of methodology and sources of data. In 1971, Massachusetts Institute of Technology professor of engineering, Dr. Jay Forrester, published a book in which the author, using a computer simulation, predicted essentially that the world was doomed to an irreversible state of constantly declining economic and social well-being unless drastic changes were made in almost all aspects of life, specifically including a 40% reduction in gross investment and a 20% reduction in food production. J. FORRESTER, WORLD DYNAMICS (1971). To readers without a sophisticated understanding of mathematical models, a category including most agency decisionmakers, the Forrester work appeared impressive and sufficiently persuasive to evoke significant policy actions. However, Yale professor of economics William Nordhaus published a detailed critique of Forrester's methodology in which he demonstrated, among other serious methodological flaws, that Forrester's assumptions concerning the way in which population responds to other variables, if applied to recent past periods in history, would have predicted an increase in population in the United States and Great Britain during a period in which population actually declined, and 5% annual decline in the population of India during a period when the population of that country increased rapidly. Nordhaus, *World Dynamics: Measurement Without Data*, 1973 ECON. J. 1156, 1161.

215. *See* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650-53 (D.C. Cir. 1973) (Bazelon, J., concurring).

Leventhal's requirement that the agency respond to comments and criticisms in a manner indicating the agency has taken a "hard look" at those criticisms[216] at least would assure that responsible agency personnel considered serious public criticisms. In many circumstances, the court may have to be content with responses such as: the criticism of methodology is valid but the agency is aware of no better way of conducting the analysis in the time available for decision; the data used by the agency is indeed suspect, but no better data exists; or alternative methods of analysis or sources of data suggested in criticisms have drawbacks at least as serious as those attributed to the agency methods and sources. In most such cases, the court should defer to the agency and affirm, in recognition of the fact that most complex regulatory decisions must be based upon imperfect methodology and uncertain factual predicates. The reviewing court will have accomplished a great deal simply by forcing the agency to expose publicly the facts and methodology it proposes to rely upon, and to respond to well-supported criticisms.

Hybrid Procedures

In *Mobil Oil Corp. v. FPC*[217] (*Mobil II*), the District of Columbia circuit court compelled an agency not otherwise required by statute to render decisions through adjudicatory procedures to " 'realistically tailor the proceedings to fit the issues before it, the formation it needs to illuminate those issues and the manner of presentation. . . .' "[218] Specifically, the court held that although the FPC was not required by statute to act through adjudicatory proceedings, the policy questions before the agency were so "inextricably bound up with relatively specific factual issues"[219] that "some sort of adversary, adjudicative-type procedures" were essential.[220] To meet the additional procedural requirements imposed, the court suggested selective cross-examination on certain issues[221] as well as other permissible means of providing "some mechanism whereby adverse parties can test, criticize and illuminate the flaws in the evidentiary basis being advanced regarding a particular point."[222] Because almost all major agency policy decisions

216. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973).
217. 483 F.2d 1238 (D.C. Cir. 1973).
218. *Id.* at 1252 (quoting City of Chicago v. FPC, 458 F.2d 731 (1971), *cert. denied*, 405 U.S. 1074 (1972)).
219. *Id.* at 1253.
220. *Id.* at 1259.
221. *Id.* at 1263.
222. *Id.* at 1262-63.

are predicated upon "relatively specific facts," the potential applicability of *Mobil II* was broad in scope.

Despite its potential impact, the "flexible approach" to choosing agency procedures and the hybrid procedures mandated by *Mobil II* were short-lived. The decision was the subject of considerable criticism,[223] rejected by other circuits,[224] implicitly repudiated by the Supreme Court,[225] and ultimately even abandoned by the court in which it originated.[226] The most telling criticism was the practical concern that agencies would not be able to predict in advance the procedures a reviewing court would find most appropriate in a particular case and thus consistently would use adjudication to avoid reversal on procedural grounds.[227] Although this criticism seems well-founded in instances in which procedures are imposed after the fact by appellate courts, it would be unfortunate if the denouement of the *Mobil II* controversy marked the abandonment of efforts by Congress[228] and various agencies to improve the quality of regulatory decisionmaking by prospective adoption of hybrid procedures. Indeed, many recent statutes require the use of hybrid procedures,[229] and several agencies have adopted them voluntarily.[230] The FPC's establishment of two nationwide rates for new domestically produced gas illustrates the advantages of hybrid procedures.[231]

After attempting for twenty years to establish natural gas producer prices through adjudicatory proceedings,[232] the FPC abandoned the

223. *See, e.g.*, Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974).

224. *See, e.g.*, Shell Oil Co. v. FPC, 520 F.2d 1061 (5th Cir. 1975), *cert. denied sub nom.* California Co. v. FPC, 426 U.S. 941 (1976); Phillips Petroleum Co. v. FPC, 476 F.2d 842 (10th Cir. 1973).

225. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

226. American Public Gas Ass'n v. FPC, 567 F.2d 1016 (D.C. Cir. 1977).

227. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 546-47 (1978).

228. Congress has enacted numerous statutes in recent years which compel agencies to use a wide variety of hybrid procedures. *See* Fuchs, *Development and Diversification in Administrative Rulemaking*, 72 NW. U.L. REV. 83 (1977).

229. *Id.*

230. *See* REGULATORY DELAY, *supra* note 7, at 37-38.

231. *See* American Public Gas Ass'n v. FPC, 567 F.2d 1016 (D.C. Cir. 1977); Shell Oil Co. v. FPC, 520 F.2d 1016 (5th Cir. 1975), *cert. denied sub nom.* California Co. v. FPC, 426 U.S. 941 (1976).

232. In Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954), the Court established the Commission's obligation to regulate the wellhead price of natural gas sold in interstate commerce. Initially the Commission attempted to perform that task through adjudication of separate rates for each producer. However, it was forced to abandon this method of pro-

adjudicatory approach in this area of regulation. Rather than adopting pure informal rulemaking of the type used by the FEA to establish analogous ceilings on the price of crude oil and petroleum products, the FPC opted for hybrid procedures that publicly disclosed its staff's methodology and data, encouraged the submission of both data and criticisms from affected parties, and provided for methods through which private parties could test and respond to the data and criticisms submitted by other private parties.

The Commission initiated national wellhead rate proceedings by notices announcing its intention to establish nationwide gas producer rates and inviting all interested members of the public to submit comments and data suggesting appropriate rates.[233] The Commission proposed no specific rate in its notices, but stated that its staff would submit comments supporting one or more rate ceilings.[234] The comments submitted included recommendations from two elements of the FPC staff, supported by detailed descriptions of the manner in which the recommended rate ceilings were calculated, the methodology and assumptions underlying the staff recommendations, and the sources of all data relied upon.[235] All parties were given an opportunity to respond to both the staff submissions and the initial comments of other parties.[236] Because the bases for the staff proposals were set forth in detail, many of the responsive comments included expert affidavits disputing staff data and methodology. Supplemental reply comments were allowed to permit criticism of any additional data or views provided in the reply comments, and the parties were notified of and given a specific opportunity to respond to all additional data brought to the Commission's attention as a potential source for its decision.[237] Thus, with the exception of one important source of data kept private pursuant to the terms of a court order,[238] every aspect of the factual and

ceeding because its first ten proceedings required six years to complete and its backlog of applications for producer rates had grown to 2,900. *See* S. BREYER & P. MACAVOY, ENERGY REGULATION BY THE FEDERAL POWER COMMISSION 68 (1974). *See also* Permian Basin Area Rate Cases, 390 U.S. 747, 758 (1968). The Commission's next venture into producer ratemaking consisted of establishing producer rates through adjudicatory procedures for each of several geographical areas. However, its first area rate proceeding required eight years to complete and produced a rate in the late 1960s which was based upon average costs of the early 1960s. *See* Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

233. American Public Gas Ass'n v. FPC, 567 F.2d 1016, 1127 (D.C. Cir. 1977).

234. *Id.*

235. *Id.* at 1027 n.8 & 1064.

236. *Id.*

237. *Id.* at 1027 n.8.

238. *Id.* at 1027 n.9 (reserve estimates not disclosed).

analytical basis for the agency's proposed action was made available to the public in time to permit meaningful analysis and criticism. As a result, in less than two years the Commission was able to establish nationwide wellhead rates for natural gas, whereas past efforts had required close to a decade in each of several adjudicatory proceedings. Moreover, a comparison of the court and Commission opinions in the two nationwide rulemaking proceedings with those in the various adjudicatory proceedings makes apparent that the quality of factual and policy analysis did not suffer due to the transition from adjudication to hybrid rulemaking. Hybrid rulemaking had the significant added advantage that, because of the shorter time span, the facts relied upon in the rulemaking proceedings were much more current than those in the record of the protracted adjudicatory proceedings.[239] Furthermore, the record available for substantive review by the courts was at least as helpful for that purpose as the record of an adjudicatory proceeding. In affirming the decisions, the courts could see exactly what the agency did, the rationale for its action, and why it accepted or rejected each significant public criticism of its data or methodology.

Hybrid procedures of the type used by the FPC in its national rate cases and the various forms of hybrid procedures suggested by the court in *Mobil II* appear to offer a great deal of promise for balancing efficiency versus effectiveness in the modern regulatory process; however, a few additional procedural safeguards should be added to the FPC's approach to maximize the quality of decisionmaking. First, parties should be told that any factual data or analytical material requiring nonlegal expertise will be given serious consideration only if submitted in the form of an affidavit in which the qualifications of the affiant and the source of the data relied upon are set forth. Second, the parties should be informed that the results of calculations will be considered only if the methodology employed is described in detail. Third, parties should be invited to submit requests to cross-examine any affiant, accompanied by statements as to what information cross-examination may be expected to elicit and the importance of that information. Fourth, the agency should make clear its intention to permit cross-examination of any affiant when it believes that the circumstances warrant such a procedure. While the first two requirements merely permit criticism of data and analysis analogous to that made available in *Portland Cement*, the last two requirements add a new factor.

239. *Compare* American Public Gas Ass'n v. FPC, 567 F.2d 1016 (D.C. Cir. 1977) *with* Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

As noted previously,[240] cross-examination can be extraordinarily inefficient and costly. In contrast, the foreknowledge that a witness *might* be required to undergo cross-examination, especially when the agency seriously considers relying upon the evidence provided by that witness and an opposing party indicates an expectation of eliciting damaging facts on cross of the witness, could have a prophylactic effect with little reduction in efficiency. The agency could use its residual discretion to permit cross-examination rarely, while simultaneously inducing staff members, parties, and outside affiants to take care in presenting their cases accurately.

Accordingly, although the courts are wise to retreat from imposing flexible procedural requirements in retrospect, Congress and agencies should be encouraged to continue exploring new methods of combining the beneficial characteristics of adjudication with those of informal rulemaking.

Collection and Verification of Facts Required to Implement Policy Decisions

Regardless of the method used to develop and test the facts relied upon in promulgating a policy, the significant problem of gathering and verifying the facts required to implement the policy selected remains. One possible method is illustrated by FPC efforts to implement curtailment policy. The end use data required to implement curtailment policy is gathered and tested through cross-examination in the same multiparty adjudicatory proceeding in which the facts relevant to the formulation of that policy are assessed. There are two theoretical advantages associated with this method of proceeding. First, the facts required for implementation also may be of assistance in policy formulation. Second, cross-examination is available as a means of testing the accuracy of the implementation data. The disadvantages of this approach, however, also are apparent. Combining hundreds of contested facts relevant to policy formulation issues with thousands of facts necessary for implementation greatly protracts the proceedings. Moreover, the right to test these facts through cross-examination in the context of such a proceeding is largely illusory; this factor is especially significant given the res judicata effect of the resultant findings that inhibits efforts to correct subsequently discovered factual misrepresentations.

Gathering detailed implementation facts through informal rulemaking does not seem adequate. Except in the case of the few very large gas consumers on a pipeline system, no individual party would

240. See notes 152-56 & accompanying text *supra*.

have sufficient incentive to study, for example, the purported characteristics of combustion equipment used by another party to justify a meaningful effort to analyze and criticize the written classification requests submitted by each of thousands of consumers. Yet the economic and moral costs of relying entirely upon the representations of consumers who have strong incentives to misrepresent could be very large.[241] This presents a true dilemma in selecting appropriate procedures.

One possible solution to the problem of developing reliable specific facts for policy implementation is to devise policies requiring little or no fact finding for their effectuation. For instance, the distinctions between various industrial uses of natural gas in curtailment plans could be eliminated. A less drastic variation would be to substitute more objective and easily ascertainable factual distinctions for those that are subjective and more difficult to determine.[242] Easily implemented policies that avoid difficult factual determinations, however, often can be adopted only at a high cost. For instance, the FPC was presented with evidence suggesting that failure to distinguish between industrial uses of gas that can and cannot be converted to alternate fuels would result in unnecessarily incurring billions of dollars of economic costs in the replacement of combustion equipment rendered worthless by lack of access to a gaseous fuel.[243] This and similar circumstances indicate that optimum policymaking usually will depend upon accurate determination of specific implementation facts, notwithstanding the difficulty and high cost of devising an effective system for making such factual distinctions.

One alternative offering considerable promise as a means of obtaining reliable implementation data is a data collection/selective au-

241. See text accompanying notes 157-64 *supra*.

242. For instance, the Commission's ambiguous and highly subjective standard for process gas, "gas use for which alternative fuels are not technically feasible," 18 C.F.R. § 2.78(c)(8) (1978), could be replaced with a more objective standard, such as, "gas use in which alternate fuels cannot be used without complete replacement of existing combustion equipment."

In the evidentiary exhibit which has been most heavily relied upon by the Commission in establishing end use curtailment plans, the Commission was cautioned not to attempt to identify all high priority uses of gas because of the extreme administrative difficulty of such an undertaking. Rather, the Commission was urged to identify a few very large volume low priority uses, placing all other industrial uses in a residual high priority classification. *See* J. Jensen & T. Stauffer, Implications of Natural Gas Consumption Patterns for the Implementation of End-Use Priority Programs 9-10 (1971). The Commission ignored this sound advice and devised a priority system which requires it to distinguish between thousands of types of combustion units.

243. *See* J. Jensen & T. Stauffer, Implications of Natural Gas Consumption Patterns for the Implementation of End-Use Priority Programs 8-10 (1971).

dit/sanction system similar to that employed by the Internal Revenue Service. Taking end use curtailment data as an example, each affected consumer could be required to make its own initial classification decision and to supply the information supporting that determination to regulatory authorities in a standardized format. The Commission then could establish an audit staff with responsibility to apply a few mechanical checks on the supporting data provided and to select, through appropriate audit criteria, a sample of supporting submissions for intensive audit. To be effective, such a system would have to be used in conjunction with sanctions.

In contrast, the present system of theoretical reliance upon adjudicatory procedures presents a combination of the worst of all possibilities. Argumentative cross-examination of countless implementation facts prolongs policymaking proceedings and obscures considerations more important to policy formulation issues while contributing little to testing the implementation facts asserted. Simultaneously, efforts to correct previous erroneous "findings" of implementation facts are met with arguments that the prior findings are res judicata or, at the least, that the Commission can only change its findings prospectively.[244] The present system might be analogized aptly to attempting to insure accurate submission of income tax data by inviting all taxpayers in a given geographical area to participate in a hearing in which each would have the right to cross-examine all others concerning the accuracy of their returns.

Legal Constraints Upon Agency Choice of Decisionmaking Procedures

The above discussion has approached the selection of decisionmaking procedures almost entirely from the perspective of the immediate concerns of the participants, attempting to impart efficiency while maintaining and improving upon quality. But such selection does not occur in a vacuum. Administrative agencies must select appropriate procedures from within a framework of statutory and constitutional constraints. Three potential sources of such constraints require our at-

244. *See, e.g.*, Transcontinental Gas Pipe Line Corp., No. RP 72-99 (July 10, 1978) (Order Requiring Additional Information), which recognized that principles of res judicata or collateral estoppel may preclude correction of a previous end use classification, but expressing frustration at "a conflict in testimony of such magnitude, that, for the undersigned to presently ignore it, on one estoppel theory or another, would be contrary to the letter and spirit of pertinent Commission pronouncements in Docket No. RP 72-99."

tention: due process, the Administrative Procedure Act,[245] and agencies' organic acts. These constraints form what the District of Columbia circuit court aptly has termed a "baroque structure,"[246] devoid of classical precision and capable of generating considerable confusion. Nevertheless, an analysis of the present limitations upon agency procedural options reveals the structural changes necessary for effective and efficient decisionmaking.

The Due Process Clause

General Contours

Although the general contours of due process are discernable with relative ease, the specific requirements applicable in any given situation, as noted by the Supreme Court, "are undefinable, and [the] content varies according to specific factual contexts."[247] The Court has emphasized the malleability of this protection, stating that "due process is flexible and calls for such procedural protections as the particular situation demands."[248] The law, however, is settled that once potential deprivation of a significant life, liberty, or property interest is at stake, the affected party must be given an opportunity to be heard,[249] and that opportunity must be at "a meaningful time and in a meaningful manner."[250] Upon concluding that a particular interest calls for due process protection,[251] analysis focuses upon a "determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."[252] The Supreme Court currently subscribes to the test recently restated in *Mathews v. Eldridge*,[253] comprised of three distinct factors that must be balanced:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and the administrative burdens that the additional or substitute procedural

245. 5 U.S.C. §§ 551, 553, 555, 557-58, 701-706 (1976); 5 U.S.C.A. §§ 552, 554, 556, 559 (West 1977 & Supp. 1979).

246. Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1250 (D.C. Cir. 1973).

247. Hannah v. Larche, 363 U.S. 420, 442 (1960).

248. Morrisey v. Brewer, 408 U.S. 471, 481 (1972).

249. Boddie v. Connecticut, 401 U.S. 371, 379 (1970); Grannis v. Ordean, 234 U.S. 385, 394 (1914).

250. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

251. *See* Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

252. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

253. 424 U.S. 319 (1976).

requirement would entail.[254]

In attaching the proper weight to the private interests affected by government actions, the degree of deprivation[255] and the length of the deprivation[256] are significant. The agency's procedures for entertaining complaints are important[257] in predicting the probability of an erroneous determination. Finally, although financial cost is not necessarily decisive in the Court's equation, "[a]t some point the benefit of an additional safeguard to the individual affected by administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost."[258]

In assessing the restraining effect of the due process clause on agency procedure-selection, the central issue is determining those circumstances in which an oral hearing, including the right to cross-examine adverse witnesses, is compelled by the constitution. As has been shown, the requirement of some form of quasi-judicial hearing has the greatest potential for impairing regulatory agency efficiency by protracting the decisional process.[259] The significance of this procedural safeguard in regulatory reform propels into the foreground the Supreme Court's seminal decisions in *Londoner v. Denver*[260] and *Bi-Metallic Investment Co. v. State Board of Equalization*.[261]

Both cases concerned property tax assessments in the city of Denver. In *Londoner*, the Court considered whether due process was denied to property owners who were refused a hearing at which they could challenge a special assessment and apportionment of taxes for street paving. The Court concluded that due process did in fact require an opportunity to be heard:

> [W]here the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard . . . .[262]

Notably, the exact nature of the required hearing was not specified, the Court stating only that "[h]ere a hearing in its very essence demands

254. *Id.* at 335.
255. *Id.* at 341.
256. Fusari v. Steinberg, 419 U.S. 379, 389 (1975).
257. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 18 (1978).
258. Mathews v. Eldridge, 424 U.S. 319, 348 (1976).
259. See text accompanying notes 18-135 *supra*.
260. 210 U.S. 373 (1908).
261. 239 U.S. 441 (1915).
262. 210 U.S. 373 at 385.

that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal."[263]

Delineation of when such a hearing would be required was to some extent supplied in *Bi-Metallic*, in which the petitioner challenged an across-the-board forty percent upward revaluation of all taxable real property in Denver, on the ground that the absence of an opportunity to be heard meant that his property would be taken without due process of law.[264] Speaking for the Court, Justice Holmes held that due process was not violated. *Londoner* was distinguished on the ground that, in that case, "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds."[265] With regard to situations such as that presented in *Bi-Metallic*, Justice Holmes observed:

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting [sic] or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. . . . There must be a limit to individual argument in such matters if government is to go on.[266]

The dichotomy posed by *Londoner* and *Bi-Metallic* has had a substantial impact in both regulatory and nonregulatory contexts. Although the Supreme Court has appeared upon occasion to move in divergent directions when considering the application of due process to these two broadly defined areas, examination of the leading decisions reveals no fundamental inconsistency.

Application in the Regulatory Context

The crucial distinction between *Londoner* and *Bi-Metallic* as applied in the regulatory context can be debated. For instance, in *Air Line Pilots Association International v. Quesada*,[267] an appellate court relied upon *Bi-Metallic* for the proposition that due process does not require an opportunity for each individual to be heard if the sheer number of parties poses grave administrative burdens.[268] Yet in *O'Donnel v. Shaf-*

263. *Id.* at 386.
264. 239 U.S. at 444.
265. *Id.* at 446.
266. *Id.* at 445.
267. 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961).
268. *Id.* at 896.

fer,[269] a judicial review of an agency's refusal to order an oral adjudicatory hearing on the same rule considered in *Quesada*, the focus moved from the pragmatic effect of conducting a multiparty hearing to the fact that the agency action did not "single out any particular [party] for special consideration based on its own peculiar circumstances."[270] This latter approach reflects Professor Davis' view that *Bi-Metallic* and *Londoner* "should not be interpreted as supporting the proposition that the requirement of a hearing should depend upon the number of parties. The emphasis should be upon the 'individual grounds.' The true test is whether the facts are general or concern individuals."[271] Professor Davis defines the distinction as the difference between "adjudicative" and "legislative" facts:

> Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.[272]

From Professor Davis' standpoint, the *Londoner* Court's concern centered on how the city council decided whether, in what amount, and upon whom the assessment should be levied, classic examples of "adjudicative" facts. In contrast, *Bi-Metallic* examined the constitutionality of a policy decision to increase all property valuations by forty percent, a decision analogous to legislative determinations. Because cross-examination in an adjudicatory hearing presumably could contribute little to the development of "legislative" facts, due process did not require such a hearing; but because in *Londoner* the property owners were the parties most likely to know the value of the new street to their properties and to be able to test the city's contentions concerning such adjudicative facts, due process required an opportunity for them to be heard.[273]

Thus, two very different principles can be derived from *Londoner* and *Bi-Metallic*. One interpretation suggests that an agency may not be required to hold judicial-type hearings when such a requirement would significantly impair the agency's ability to carry out a substantively permissible regulatory program. A second view holds that an agency may

269. 491 F.2d 59 (D.C. Cir. 1974).
270. *Id.* at 62.
271. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.05, at 378 (1958).
272. *Id.* § 7.02, at 413.
273. *Id.*

not be required to hold an adversarial hearing when the factual issues in dispute are legislative, rather than adjudicative.

Two significant opinions suggest that the second interpretation is preferred. In *ICC v. Louisville & Nashville Railroad*,[274] decided before *Bi-Metallic*, a party complained to the ICC that a railroad's through-rates were higher than the sum of the local rates between the same stations. The railroad appealed the ICC's order lowering the through-rates, and the Court stated: "[I]t has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied . . . ."[275] The Court held that "[a]ll parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal."[276] Similarly, in *Ohio Bell Telephone Co. v. Public Utilities Commission*,[277] the Court declared that the right to a fair and open hearing had been denied the petitioner when the defendant Commission fixed rates chargeable by Ohio Bell Telephone on the basis of evidentiary facts not disclosed in the record.[278] In both *Louisville & Nashville Railroad* and *Ohio Bell Telephone*, the Court emphasized that the agencies' tasks consisted of "quasi-judicial" determinations in that they were based upon facts relating solely to a single party and directly affecting the party on individual grounds.[279]

A novel third approach to the application of the due process clause in regulatory proceedings emerged in the District of Columbia Circuit in the mid-1960s.[280] In *American Airlines Inc. v. CAB*,[281] the court declared "its readiness to lay down procedural requirements deemed inherent in the very concept of fair hearing for certain classes of cases, even though no such requirements had been specified by Congress."[282] Since that decision, the court repeatedly has demonstrated its willing-

274. 227 U.S. 88 (1913).
275. *Id.* at 91.
276. *Id.* at 93.
277. 301 U.S. 292 (1936).
278. *Id.* at 300. *See also* Morgan v. United States, 304 U.S. 1 (1938).
279. ICC v. Louisville & Nashville R.R., 301 U.S. 292, 300-03 (1936); Ohio Bell Tel. Co. v. PUC, 227 U.S. 88, 91 (1913).
280. It is at least arguable that the District of Columbia Circuit's nonstatutory requirements for adjudicatory hearings were predicated upon a nonconstitutional common law judicial power, rather than the due process clause. *See* J. MASHAW & R. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS 325-27 (1975).
281. 359 F.2d 624 (D.C. Cir. 1966).
282. *Id.* at 632.

ness to require procedures beyond those mandated by statute.[283] The court imposed its ad hoc procedural requirements in two related situations: first, when "critical issues" could not be pursued adequately without cross-examination; and, second, when agency actions consisted of highly technical decisions affecting the natural environment.

The "critical issues" test, as applied by the circuit court, referred to factual disputes that arise in the context of regulatory actions. The test focused not on the relation of the dispute to the particular circumstances of any parties, but on the importance that certain issues involved in the dispute hold for the action the agency eventually takes.[284]

Judge Bazelon was the most outspoken proponent of increased procedural requirements in the second circumstance. His thesis was that the public's stake, as opposed to private interests, in agency decisions affecting the environment required greater protection than that ordinarily accorded purely economic interests.[285] Writing in *International Harvester Co. v. Ruckelshaus*[286] and *Friends of the Earth v. AEC*,[287] Judge Bazelon argued that because judges are ill-equipped to undertake substantive review of mathematical and scientific evidence, the best way to prevent unreasonable or erroneous administrative decisions would be to promote debate between informed parties and "to establish a decision-making process which assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public."[288] Judge Bazelon concluded that "[t]hese complex questions should be resolved in the crucible of debate through the clash of informed but opposing scientific and technological viewpoints."[289]

283. *See, e.g.*, Natural Resources Defense Council v. NRC, 547 F.2d 633 (D.C. Cir. 1976); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

284. International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 631 (D.C. Cir. 1973). Such issues must "involve factual components of such relative importance that a greater assurance of accuracy is required than that which accompanies notice and comment procedures." Natural Resources Defense Council v. NRC, 547 F.2d 633, 656 (D.C. Cir. 1976).

285. International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651 (D.C. Cir. 1973). Judge Bazelon's approach relied upon an expanded notion of procedural due process that relates not to additional process due private parties whose interests are jeopardized, but to the process due the public at large: "This 'new era' does not mean that courts will dig deeper into the technical intricacies of an agency decision. It means intead that courts will go further in requiring the agency to establish a decision-making process adequate to protect the interests of all 'consumers' of the natural environment. In some situations, traditional rules of 'fairness'—designed only to protect the interests of specific parties to a proceeding—will be inadequate to protect these broader interests." *Id.*

286. 478 F.2d 615 (D.C. Cir. 1973).

287. 485 F.2d 1031 (D.C. Cir. 1973).

288. International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973).

289. *Id.* These opinions are in sharp contrast to the views expressed by Judge Bazelon two years earlier in Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C.

Although the District of Columbia circuit court split on the application of the "critical issues" test,[290] there was at least general agreement that special circumstances in which the normal procedure proved inadequate may require more stringent procedures. Speaking for the majority in *International Harvester*, Judge Leventhal suggested that "a right of cross-examination, consistent with time limitations, might well extend to particular cases of need, on critical points where the general procedure proved inadequate to probe 'soft' and sensitive subjects and witnesses."[291] With specific regard to technical agency decisions affecting the environment, however, Judges Bazelon and Levanthal disagree on the appropriate procedural approach. In a concurring opinion in *Friends of the Earth*, Judge Levanthal criticized what he perceived to be Judge Bazelon's procedural overreaching:

> Judge Bazelon's underlying approach, voiced in his separate opinion in *International Harvester*, seems to be pointed toward distending the procedural requirements for rule-making. He seems to be trying to chart a course whereby cross-examination will become routine in rule-making proceedings, subject to exceptions for unusual or emergency circumstances. The view developed in the majority opinion in *International Harvester*, is that oral presentations in rule making, however desirable, are not generally required, and that such requirements as may be evolving apply to critical issues where alternative procedures are not adequate.[292]

This dispute was rendered moot by the Supreme Court's recent opinion in *Vermont Yankee Nuclear Power Corp. v. NRDC*,[293] which dealt a fatal blow to both of the District of Columbia circuit court's novel tests for requiring oral procedures in the regulatory context. Because the trilogy of cases culminating with *Vermont Yankee* also provides insights into the Court's current thinking on the more traditional due process tests, the entire sequence of decisions will be described briefly.

In the first of the three cases, *United States v. Allegheny-Ludlum Steel Corp.*,[294] an Interstate Commerce Commission (ICC) rule requir-

Cir. 1971), where he took the position that administrators should articulate better the factors on which they base their decisions in order to facilitate a more probing substantive review by the court.

290. *See* Wright, *The Courts and the Rule Making Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 384 (1974).

291. 478 F.2d at 631. Compare Judge Bazelon's observation in O'Donnel v. Shaffer, 491 F.2d 59 (D.C. Cir. 1974), that "[t]his Court has long recognized that basic considerations of fairness may dictate procedural requirements not specified by Congress. Oral submissions may be required even in legislative-type proceedings, and cross-examination may be necessary if critical issues cannot be otherwise resolved." *Id.* at 62.

292. 485 F.2d at 1035.

293. 435 U.S. 519 (1978).

294. 406 U.S. 742 (1972).

ing empty freight cars to be returned in the directions of their owners' tracks was attacked on grounds that the agency unlawfully had refused to grant a request for an adjudicatory hearing before promulgating the rule. The Court affirmed the agency action, holding that the requirement of a "hearing" in the agency's organic act did not necessitate a judicial-type hearing.

In the second case, *United States v. Florida East Coast Railway Co.*,[295] an ICC rule establishing incentive per diem rates to be paid by a railroad using a boxcar to the railroad owning the car was challenged on the ground that the agency unlawfully denied a request for adjudicative hearings. Although this rule was promulgated under a different provision of the ICC's organic act, the Supreme Court found the rule valid, holding that the "after hearing" language of the statutory provision also did not refer to an adjudicatory hearing. Two justices dissented, arguing that the per diem rate rule imposed a financial liability on the contesting railroads based upon evidentiary facts not subject to cross-examination.[296] Although the dissent's thesis has some support in the prior opinions of the Court,[297] the majority responded to the dissent by distinguishing *Louisville & Nashville* and *Ohio Bell Telephone*,[298] emphasizing that the incentive payments at issue in *Florida East Coast* were applicable to all railroads: "No effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances."[299] Thus, while *Florida East Coast* superficially reaffirms the continuing viability of the adjudicative-legislative fact distinction, it also narrows the principle; under *Florida East Coast*, the requirement of a trial-type hearing applies only when a protected interest is at stake, the case turns upon the resolution of adjudicative facts, and the agency action singles out a particular party for special treatment based upon its findings with respect to those facts.

Finally, in *Vermont Yankee Nuclear Power Corp. v. NRDC*,[300] the Court firmly established the restrictive view of the relation between due process and administrative procedure hinted at in *Allegheny-Ludlum* and *Florida East Coast*. *Vermont Yankee* reversed a District of Columbia Circuit Court of Appeals decision invalidating licensing for opera-

295. 410 U.S. 224 (1973).

296. *Id.* at 247 (Douglas & Stewart, J.J., dissenting).

297. The information relied upon by the ICC as the basis for its rule comprised "adjudicative facts concerning the parties and their activities, businesses and properties." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958).

298. 410 U.S. at 245.

299. *Id.* at 246.

300. 435 U.S. 519 (1978).

tion of a nuclear power plant, on the ground that the informal, non-adjudicatory rule-making procedure used by the Atomic Energy Commission did not satisfy due process requirements despite its full compliance with section 4 of the APA. The Supreme Court ruled that section 4, which requires only that an agency give public notice of a proposed ruling with an opportunity to comment thereon, establishes the "maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rule-making."[301] In considering the interface between due process and the APA, the Court stated that proceedings categorized as "rule-making" do not require adjudicatory-type decisionmaking procedures previously considered mandated by due process; the sole, "extremely rare"[302] exception occurs only "when an agency is making a 'quasi-judicial' determination by which a very small number of persons are 'exceptionally affected, in each case upon individual grounds.' "[303] This due process criterion, first enunciated in *Bi-Metallic*, and found again in *Florida East Coast*, limits the requirement of adjudicatory procedures to those situations in which a rule "singles out" a particular party "for special consideration based on its own peculiar circumstances."[304]

Consequently, while the *Vermont Yankee* opinion speaks primarily in terms of statutory interpretation, it definitively extinguishes any arguably constitutional basis for the District of Columbia circuit court's "technical environmental issues" and "critical issues" tests for requiring procedural safeguards beyond those mandated by the APA.

Beyond this conclusion, however, there is little else that can be described as definitively settled by *Vermont Yankee*. Read together, *Florida East Coast* and *Vermont Yankee* raise at least three significant questions: What is a rulemaking? When is the product of a rulemaking an action exceptionally affecting a very small number of persons upon individual grounds? Does the APA or due process compel the use of procedural safeguards short of adjudicatory hearings, such as Judge Leventhal's expanded notice concept,[305] when an agency employs rulemaking that otherwise would leave the factual predicates of its action undisclosed and untested? Answers to these questions are suggested after a brief evaluation of relevant cases interpreting the due

301. *Id.* at 524.
302. *Id.*
303. *Id.* at 542.
304. United States v. Florida East Coast Ry. Co., 410 U.S. 224, 246 (1973).
305. See text accompanying notes 204-16 *supra*.

process clause in nonregulatory contexts and of the statutory constraints upon agency procedural choices.

Application in Nonregulatory Contexts

Recent due process decisions by the Supreme Court in nonregulatory areas show a willingness to expand procedural safeguards when an administrative agency confronts an individual citizen. The trend of decisions, from *Sniadach v. Family Finance Corp.*[306] to *Memphis Light, Gas & Water Division v. Craft*,[307] appears to contrast with the Court's reduction of procedural constraints on agencies in classic regulatory proceedings. According to the District of Columbia circuit court, there exists "a tension between the permissive procedural rulings in the informal rulemaking context and the strict procedural requirements that attach when individual deprivations of liberty or property are at stake."[308] It would be a mistake, however, to view the simultaneous constriction and expansion of administrative procedural requirements as a conflict the Court eventually must address. Indeed, the Court currently may be applying the basic due process test more rigidly in regulatory than in nonregulatory contexts. *Goldberg v. Kelly*,[309] the only case of this type in which the Court has held that a hearing closely approximating a judicial trial is necessary, possesses features that suggest several significant contextual differences underlying the trends; consequently, those seeking to streamline regulatory procedures need not look over their shoulders for fear of unexpected due process attacks.

In *Goldberg*, the Court addressed the constitutional adequacy of procedures for terminating aid under the federally assisted program of Aid to Families with Dependent Children (AFDC) and under New York State's general Home Relief program. The Court was concerned with "the narrow [issue of] whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing *before* the termination of benefits."[310] Balancing private and government interests, the Court determined that, in the welfare context, such a hearing was required. The "crucial factor" mandating a hearing was the possibility that an eligible recipient might be denied "the very means by which to live" during the interim between benefit cut-off and final disposition in

306. 395 U.S. 337 (1969).
307. 436 U.S. 1 (1978).
308. Pickus v. United States Bd. of Parole, 543 F.2d 240, 245 (D.C. Cir. 1976).
309. 397 U.S. 254 (1970).
310. *Id.* at 260.

a post-termination hearing.[311]

Arguably, *Goldberg* appeared to focus on the essential nature of the individual interest at stake. The opinion stressed the "grievous" character of the loss and the "immediately desperate" situation that termination could precipitate. But, in *Fuentes v. Shevin*[312] the Court denied this to be the emphasis in *Goldberg*,[313] and held that some kind of fair hearing was required prior to the deprivation of general household property. Moreover, in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[314] Justice White, speaking for the Court, reiterated the Court's refusal to distinguish between different kinds of property:[315] "Although the length of severity of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing it was not deemed [in *Fuentes*] to be determinative of the right to a hearing of some sort."[316]

More recently, however, the Court has stated, in *Mathews v. Eldridge*:[317] "*Goldberg* illustrates the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process."[318] Thus, *Mathews* appears to represent a return to the emphasis placed by *Goldberg* on the extent of the "grievous loss," and an implicit rejection of *Fuentes* on this point. Reversing lower court decisions mandating a hearing prior to termination of Social Security disability benefits, *Mathews* distinguished *Goldberg* on the grounds that "the disabled worker's need is likely to be less than that of a welfare recipient."[319] Consequently, Court holdings in the mass justice area can be distinguished from the contrary trend in the regulatory context because regulatory actions rarely place affected parties in a "desperate" situation.

Another distinguishable factor also appears to have contributed to the form of the hearings required in *Goldberg*. Written submissions were not considered adequate in the welfare context because most recipients lacked the "educational attainment" to present their arguments

311. *Id.* at 264.
312. 407 U.S. 67 (1972).
313. *Id.* at 89.
314. 419 U.S. 601 (1975).
315. *Id.* at 608.
316. *Id.* at 606.
317. 424 U.S. 319 (1976).
318. *Id.* at 341.
319. *Id.* at 342. The Court's comparison of the relative needs of Aid for Dependent Children recipients and disabled workers appears questionable at best, but the general principle that the significance of the property interest affected by government action should play a major role in determining how much process is due appears logically unassailable.

effectively in writing:[320] "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."[321] In contrast, the attorneys, accountants, and other hired experts representing parties before regulatory agencies presumably possess substantial facility with the written word. Thus, *Goldberg* cannot be read to mandate oral presentations in proceedings like those normally before such agencies as the NRC, the FERC and the ERA. The Supreme Court recognized in *Mathews* that physicians "are likely to be able to communicate more effectively through written documents than are welfare recipients or the lay witnesses supporting their cause."[322] The analogy is obvious.

Mathews also demonstrates in one other respect that existing due process requirements in the regulatory context may in fact be more stringent than in the nonregulatory area. The opinion casts considerable doubt on the continuing vitality of the legislative-adjudicative fact dichotomy, in contrast to the Court's apparent acceptance of a modified form of this distinction in the dicta in *Florida East Coast* and *Vermont Yankee*. The issue in *Mathews*—the physical condition of the disability benefit recipient—seems to fit a classic definition of adjudicative facts. Nonetheless, the Court declined to require an adjudicatory hearing, largely because of its belief that the less cumbersome written procedures employed were sufficiently effective in the circumstances to permit the government to avoid the added expense of oral proceedings.[323]

Administrative Procedure Act

Analysis of the APA can assist in identifying constraints on agency choice of procedures in two ways. Because Congress can require procedures more stringent than those compelled by due process, the first question is whether Congress has in fact done so in the APA. Second, interpretation of "rulemaking" as the term is used in the APA can enhance understanding of the constitutional test established in *Vermont Yankee*, which appears to require a preliminary determination that an agency action is rulemaking.

As to the first question, Congress clearly has not demanded greater use of adjudicative procedures than is required by due process. The APA itself requires an adjudicatory hearing only in the case of removal

320. 397 U.S. at 269.
321. *Id.* at 268-69.
322. 424 U.S. at 345.
323. *Id.* at 344-46.

of an administrative law judge. Although proceedings are divided between rulemaking and adjudication, only rulemakings and adjudications required by some other statute to be conducted "on the record" trigger the APA's requirements for adjudicatory hearings.[324] Thus, the distinction between rulemaking and adjudication is important in determining whether an adjudicatory hearing is required only to the extent that Justice Rehnquist has incorporated that distinction into the due process formulation announced in *Florida East Coast* and *Vermont Yankee*.[325]

The APA definition of rulemaking is an "agency process for formulating, amending, or repealing a rule,"[326] a rule being "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[327] Because the Act defines "adjudication" residually as an agency process for formulating a final disposition "other than rule making but including licensing,"[328] the APA's definition of rule represents the operative core of the Act.

Early in this century, the Supreme Court articulated the basic differences between the legislative and judicial processes which in the regulatory setting are termed rulemaking and adjudication:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.[329]

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324. 5 U.S.C. § 553(c) (1976); 5 U.S.C.A. § 554(a) (West Supp. 1979). *See* Law Motor Freight, Inc. v. CAB, 364 F.2d 139, 143-44 (1st Cir. 1966); J. MASHAW & R. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS 326 (1976).

325. Of course, once it is concluded that a proceeding must be conducted "on the record," the APA will often trigger more elaborate detailed procedural rights than the minimum required by due process. However, in most regulatory contexts, this difference in effect of due process and the APA disappears. In Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), the Court held, unfortunately rather obliquely, that if due process requires adjudicatory procedures for an action subject to the APA, the full panoply of statutory procedures required for hearings "on the record" must be provided. *Id.* at 49-50.

326. 5 U.S.C. § 551(5) (1976).

327. *Id.* § 551(4).

328. *Id.* § 551(6), (7).

329. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908). The Attorney General's Manual on the Administrative Procedure Act provides a more detailed summary of the differences between the two processes: "Rulemaking is an agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rulemaking proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's

This authoritative distinction between rulemaking and adjudication, and others, unfortunately offer limited utility in resolving the classification issue as it arises in the regulatory arena. Most regulatory proceedings both establish future policy and resolve specific factual, "adjudication" issues. Judicial attempts to determine whether factual or policy issues predominate in a given case largely are frustrated, in that policy and factual components cannot be neatly extricated from one another.

For example, reconciling the apparent exception to the *Florida East Coast* holding, applicable when agency action "single[s] out any particular railroad for special consideration based on its own special circumstances,"[330] with the inclusion of rules of "particular applicability" in the APA definition of rulemaking[331] is particularly challenging. How does a rule of particular applicability differ from an action that singles out individuals based upon their particular circumstances? Arguably, such an agency action still would be considered a rule under the APA, but its promulgation might require adjudicatory procedures under the due process clause. Likewise, the Court's distinction in *Vermont Yankee* between rulemaking and adjuciation as a partial basis for determining whether an oral hearing is required is of little assistance, as it leads to a test that has defied rational application for decades. Not surprisingly, this confusion has led many commentators to suggest that, with the exception of the "future effect" requirement, the APA's definition of rulemaking is such little help that the step of attempting to distinguish "rulemaking" from "adjudication" simply should be omitted in applying the APA to a particular regulatory action.[332]

These difficulties aside, following a conclusion that an agency action constitutes "rulemaking," the APA requires only minimal proce-

past conduct. Typically, the issues relate not to evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusion to be drawn from the facts. Conversely, adjudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action. Or, it may involve the determination of a person's right to benefits under existing law so that the issues relate to whether he is within the established category of persons entitled to such benefits. In such proceedings, the issues of fact are often sharply controverted." U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14-15 (1947) (citation omitted).

330. 410 U.S. at 246.

331. 5 U.S.C. § 551(4) (1976).

332. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW TEXT 123 (1972); J. MASHAW & R. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS 281 (1975).

dural safeguards unless the statute under which the agency purports to act requires a decision "on the record after opportunity for an agency hearing"[333] or Congress otherwise has indicated such an intent.[334] An agency must only: (1) publish notice of proposed rulemaking in the Federal Register; (2) provide interested parties an opportunity to participate in the rulemaking through written submittals; and (3) incorporate within the rules adopted "a concise general statement of their basis and purpose."[335]

The notice itself must disclose: (1) the time, place, and nature of the public rulemaking procedures; (2) the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.[336] One of the critical issues the Supreme Court must soon address is whether "notice" requires more than this bare framework.[337] While the Supreme Court's interpretation of the APA in *Vermont Yankee* indicates a more literal approach is probable, the Court has had no opportunity to pass upon the District of Columbia Circuit's expanded notice requirement.[338]

Agency Organic Acts

The final potential constraints upon agency choice of procedures are the statutes governing the agency's substantive authority to act. Organic acts can constrain agency discretion either by requiring specific procedures or by interaction with APA procedures applicable to adjudication on the record, or "formal rulemaking." Of course, the plethora of organic acts governing energy agency actions precludes analysis in this Article of the statutory procedures required by each.[339] This

333. 5 U.S.C. § 553(c) (1976).

334. *See, e.g.*, Independent Bankers Ass'n v. Board of Governors of the Fed. Reserve Sys., 516 F.2d 1206, 1212-14 (D.C. Cir. 1975).

335. 5 U.S.C. § 553(c) (1976).

336. *Id.* § 553(b).

337. See text accompanying notes 400-07 *infra*.

338. In *Vermont Yankee*, for instance, the agency provided detailed information concerning the factual predicates and methodology underlying its proposal in ample time to permit critical comments.

339. In particular, Congress recently passed five statutes significantly expanding and modifying the authority of both the FERC and the ERA. Each contains numerous procedural provisions which could be interpreted to require additional procedures in some cases. *See* Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (1978); Power Plant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 (1978); National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 (1978); Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 (1978); Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978). There is also, of course, the very complex

Article focuses instead on those under which the Federal Energy Regulatory Commission and the Economic Regulatory Administration act in most cases: the Natural Gas Act,[340] the Federal Power Act,[341] and the Department of Energy Organization Act.[342]

Constraints upon agency procedural choices under the Natural Gas Act and Federal Power Act are minimal.[343] With the District of Columbia circuit court's opinion in *American Public Gas Association v. FPC*,[344] the federal appellate courts finally reached a consensus concerning the procedural requirements imposed by these Acts: neither the "after a hearing" nor the "substantial evidence" requirements compel procedures more rigorous than those prescribed by the APA for informal rulemaking.

The DOE Act appears not to require adjudicatory procedures in any cases, but nonetheless makes significant changes in the procedures ERA must follow in regulating the petroleum industry. The earlier Federal Energy Administration Act[345] and the Economic Stabilization Act[346] reflected the crisis-oriented environment in which they were enacted. Compliance even with some APA requirements for informal rulemaking was excused, with the agency merely required to provide ten days notice prior to adopting a rule.[347] Even that requirement could be waived whenever the agency found it necessary to do so.[348] As a result, the principal procedural dispute during the first years of petroleum industry regulation was whether any notice was required.[349] The DOE Act subjects ERA's actions to the APA's procedures for in-

statutory scheme under which the Nuclear Regulatory Commission operates. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 525-27 (1978).

340. 15 U.S.C.A. §§ 717-717z (West 1976 & Supp. 1979).

341. 16 U.S.C.A. §§ 791a-828c (West 1976 & Supp. 1979).

342. Pub. L. No. 95-91, 91 Stat. 565 (1977) (codified in scattered sections of 42 U.S.C.A.).

343. Since the procedural provisions of these two statutes are identical, a court interpretation of one inevitably carries over to the other.

344. 567 F.2d 1016 (D.C. Cir. 1977). *But see* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 33 (1947).

345. Pub. L. No. 93-275, 88 Stat. 96 (1974) (codified in scattered sections of 15 U.S.C.).

346. Pub. L. No. 91-379, 84 Stat. 796 (1970), *as amended by* Pub. L. No. 92-210, 85 Stat. 743 (1971), *and as amended by* Pub. L. No. 93-28, 87 Stat. 27 (1973) (codified in scattered sections of 12 U.S.C.).

347. 15 U.S.C. § 766(i)(1)(B) (1976) (repealed 1977, Pub. L. No. 95-91, § 709(a)(2)(C), 91 Stat. 565 (1977)).

348. *Id.*

349. *See, e.g.*, National Helium Corp. v. FEA, 569 F.2d 1137 (Temp. Emer. Ct. App. 1977); Nader v. Sawhill, 514 F.2d 1064 (Temp. Emer. Ct. App. 1975); Reeves v. Simon, 507 F.2d 455 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975).

formal rulemaking,[350] thereby making the District of Columbia circuit court's expanded notice concept applicable for the first time to agency actions regulating the petroleum industry,[351] assuming the concept survives predictable post-*Vermont Yankee* attacks.[352]

The Major Questions Left Open by Vermont Yankee

The empirical analysis in the first part of this Article provides strong support for the Supreme Court's efforts in *Allegheny-Ludlum, Florida East Coast*, and *Vermont Yankee* to alleviate the burden of conforming to a judicial paradigm in what the Court has described as "rulemaking procedures in their most pristine sense."[353] Now, however, the Court may be confronted with the question of whether the trend toward minimizing judicially imposed procedural constraints should be extended in one or both of two directions. First, the Court may extend *Vermont Yankee* to eliminate mandatory use of adjudicatory procedures in individual rate, licensing, and allocation proceedings similar to those in *Louisville & Nashville* and *Ohio Bell Telephone*—cases consistently distinguished by the Court as "quasi-judicial." Second, the Court may further relax the procedural requirements imposed on agency rulemaking, thereby eliminating the District of Columbia circuit court's expanded notice concept. Considering the advantages and disadvantages of each of the alternatives, the Court should adopt the former and not the latter. Unfortunately, however, language used by the Court in its recent trilogy suggests an inclination toward the opposite conclusions.

When Does the "Extremely Rare" Exception Require an Agency to Use Adjudication?

The Court still appears to be attempting to apply the legislative-adjudicative distinction in determining the procedures required in regulatory proceedings either by due process or by the APA. Continued

350. 42 U.S.C. § 7191(a) (Supp. I 1977).

351. *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973). *See also* Wright, *Rulemaking and Judicial Review*, 30 AD. L. REV. 461 (1978).

352. Even if the Court ultimately holds the expanded notice concept to be unsupported by the APA, the DOE Act provides ample support for the requirement in the context of actions by the ERA and FERC, as the Act requires notices of rulemaking to be accompanied by "a statement of the research, analysis, and other available information in support of, the need for, and the probable effect of, any such proposed rule." 42 U.S.C. § 7191(b)(1) (Supp. I 1977).

353. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 524 n.1 (1978).

reliance on this distinction certainly will lead to holdings that are poor on policy grounds and unpredictable in their future application. Significant flaws in the legislative-adjudicative fact test render it both inappropriate and virtually useless.

Weaknesses in the Legislative-Adjudicative Fact Test

The legislative-adjudicative fact test serves a valid function only to the extent that it is a good surrogate for the three-part balancing test generally used to determine the requirements of due process. To be such, it must reflect the values underlying that test, while enhancing ease of administration and predictability. In fact, it does neither.

Distinguishing between legislative and adjudicative facts is extremely difficult in many regulatory proceedings. For instance, returning to some of the examples used earlier,[354] the net economic benefits of alternative projects, the existence or nonexistence of an active seismic fault, the ability of steel pipe of a given specification to withstand extreme ambient temperatures, and the degree of carcinogenic potential of a pesticide are typical of the significant factual issues that arise routinely in regulatory proceedings. Yet a group of agency administrators, ALJs, and appellate judges asked to categorize each item of this list would be likely to produce inconsistent results.

The adjudicative-legislative fact test is an even less satisfactory reflection of the three values that must be balanced in determining what process is due. The test provides a surrogate for only one, and even with respect to that one, it is a poor surrogate. The test has no relationship to the nature or importance of "the private interest that will be affected by the official action."[355] Once any protected interest is found, the test would appear to require the same degree of procedural protection notwithstanding the existence of large qualitative or quantitative differences among the interests at stake. Nor does the test reflect "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[356] Upon determination that any protected interest of any party will be affected by the resolution of one or more adjudicative facts, the legislative-adjudicative fact test apparently would require an oral adjudicatory hearing no matter how much cost is involved. The folly of this omission becomes evident upon consideration of the extraordinary cost to the economy resulting from the use of

354. See notes 185-89 & accompanying text *supra*.
355. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
356. *Id.*

adjudicatory procedures to resolve combination fact/policy disputes where the interests of literally thousands of parties are affected by the resolution of innumerable specific facts unique to each party.[357]

The only due process value even remotely represented by the legislative-adjudicative distinction is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."[358] The test arguably satisfies this value because, as many courts have stated, resolution of adjudicative fact disputes is greatly aided by adjudicatory procedures, which are, however, much less helpful in finding legislative facts.[359] This generalization has validity only insofar as reviewing courts classify facts as adjudicative or legislative based upon a determination that the fact is or is not susceptible to meaningful testing through oral adversary procedures. Of course, this approach simply reduces the test to a circular argument.

In any event, the shortcomings of this argument are manifold. Anyone who has cross-examined an articulate witness with a convincing demeanor in an effort to expose an intentional or inadvertent misstatement of specific fact must recognize the extreme limits of confrontation and cross-examination as means of ferreting out "truth." Moreover, the abstract notion that "adjudicative" facts can be tested effectively only through oral procedures ignores two further practical considerations. First, alternate procedures such as early and complete disclosure of the basis for an agency's anticipated findings of fact may protect the truth-seeking function at least as well as the right of live cross-examination.[360] Second, even assuming the efficacy of well prepared cross-examination, it does not follow that oral procedures will be of significant value in a polycentric regulatory proceeding where thorough preparation of cross-examination with respect to most specific facts is not practicable.[361]

The converse also holds. The accuracy of findings concerning issues of "legislative fact," such as the effect of a particular proposed rate design on the future marketability of natural gas, may be enhanced

357. See text accompanying notes 18-135 *supra*.

358. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

359. *See, e.g.*, American Bancorp. v. Board of Governors of the Fed. Reserve Sys., 509 F.2d 29 (8th Cir. 1974); Marine Space Enclosures, Inc. v. Federal Maritime Comm'n, 420 F.2d 577 (D.C. Cir. 1969); SEC v. Frank, 388 F.2d 486 (2d Cir. 1968); Utica Mut. Ins. Co. v. Vincent, 375 F.2d 129, 134 (2d Cir. 1967); American Airlines, Inc. v. CAB, 359 F.2d 624, 633 (D.C. Cir. 1966).

360. See text accompanying notes 204-44 *supra*.

361. See text accompanying notes 132-34 *supra*.

greatly through cross-examination concerning the underlying data base and methodology.[362] Indeed, considering the relative importance of such "legislative" facts in most regulatory proceedings, the practical benefit derived from permitting allegations of legislative fact to be tested through cross-examination is much greater than the practical value of permitting cross-examination concerning facts specific to the parties. Of course, as in the case of adjudicative facts, more efficient alternatives to oral adjudication may provide an acceptable means of testing the accuracy of this type of factual or predictive assertion.[363]

The Alternative to Standardization: Regulating on a Case-by-Case Basis

The first major issue that requires resolution after *Vermont Yankee* is the extent to which agencies are free to use notice and comment procedures in determining and applying policy to a particular supplier or project. Arguably, *Louisville & Nashville* and *Ohio Bell Telephone* resolved this precise question in favor of requiring an oral evidentiary hearing, and the recent dicta citing and distinguishing these decisions with apparent approval indicates their continuing vitality. Also arguable is that Justice Rehnquist's "extremely rare" exception applies and requires an agency to conduct an oral hearing when a rulemaking action resolves specific facts initially applicable to only one supplier. In most such cases, the supplier, its customers, and often even ultimate consumers are each "single[d] out . . . for special consideration based on its own peculiar circumstances."[364]

Preliminarily, consideration should be given to whether the question is now moot given *Vermont Yankee*'s apparent creation of an efficient procedural vehicle for resolving most regulatory issues. The agency can avoid providing an oral evidentiary hearing simply by promulgating a rule that applies in the same way to all parties falling within a defined class. This procedural approach also has a superficial equitable appeal, reducing the potential for disguised favoritism in the application of principles in cases involving different parties. Thus, standardization would seem to be a short route to procedural efficiency and "fairness"[365] to all affected parties.

362. See text accompanying notes 184-90 *supra*.

363. See text accompanying notes 204-44 *supra*.

364. United States v. Florida East Coast Ry. Co., 410 U.S. 224, 246 (1973).

365. It is a peculiar brand of "fairness," however, that suggests uniform regulation in the face of widely varying circumstances. For instance, in the ratemaking context, it does not necessarily serve fairness to apply the same price ceiling to suppliers with widely varying costs. Of course, other values may be served by this approach.

But standardization of substantive regulatory actions has disadvantages as well. Although standardized results substantively are preferable on certain issues, with reference to many other issues varying agency actions depending upon the particular circumstances in which the issue arises is far preferable. For example, standardized pricing for all suppliers and customers falling within generally defined categories has been adopted for natural gas producers.[366] A good argument can be made, however, that applying standard cost pricing to producers of electricity and their customers would require inordinate sacrifices in the substantive effectiveness of regulation. There may be good reasons for applying different principles, or at least for reaching different results, in determining the rates charged by utilities with different cost structures, base-load fuels, construction plans, and customer characteristics.[367] Thus, it is irrational for the courts, in effect, to dictate standardized substantive regulation by permitting agencies to use low-cost, efficient procedures when they choose this approach, while requiring them to adopt extraordinarily expensive and time-consuming procedures when taking a more individualized approach to regulation. The agency's choice should be based principally upon the substantive merits of the alternatives available. Yet, if *Vermont Yankee* is followed by a decision reaffirming the vitality of *Louisville & Nashville* and *Ohio Bell Telephone*, the choice of substantive approaches to regulation will turn almost entirely upon the general category of the issue. Standard cost pricing, uniform rate designs, and standardized facility designs, adopted as abstractions without any consideration of the individual circumstances, would be an inevitable long-term consequence.[368]

366. *See* American Public Gas Ass'n v. FPC, 567 F.2d 1016 (D.C. Cir. 1977). *See also* Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (1978).

367. *See generally* Kahn, *Can an Economist Find Happiness Setting Public Utility Rates?*, PUB. UTIL. FORT., Jan. 5, 1978, at 11, 14-15. Total reliance upon standardized facilities designs devised in generalized rulemaking proceedings also could produce markedly suboptimal results. Certainly, there are many design features that are susceptible to standardization, but there are also a great many features whose appropriateness depends critically upon the nature of the environment surrounding the facility. For instance, the design for a pipeline and the construction techniques used to install it depend largely upon the nature of the surface geology and terrain. Design and installation criteria appropriate for the permafrost of Alaska would be totally inappropriate and wastefully expensive for use across the plains states of the United States. There are many design features of this type, and adoption of standardized criteria necessarily would yield an inadequate level of environmental protection in some circumstances and unjustified additional costs in others.

368. It might be argued that generally applicable rules are always a viable option since the agency can subdivide its regulatees or proposed projects into subgroups which share characteristics relevant to the issue confronting the agency. In many cases, however, the number and possible combination of relevant characteristics is so great that the subdivision

A Proposed Test

The entering thesis underlying the following applications of the accepted due process three-part test is that direct application of the test, at least with respect to energy regulatory proceedings, dictates that adjudicatory hearings should not be required in large classes of cases apparently falling within *Vermont Yankee*'s exception for actions that "single out any particular [party] for special consideration based on its own peculiar circumstances."[369] In short, Justice Rehnquist's "extremely rare" exception to the rule should be more rare than even he apparently envisioned. This thesis can be tested by applying each of the three parts of the due process balancing test to four generic types of energy regulatory proceedings: allocation; rate design; rate level; and facilities licensing.

The Private Interests Affected

The first value to be balanced is "the private interest that will be affected by the official actions."[370] The initial point to bear emphasis is this standard's reference solely to "private interests," a point overlooked by the District of Columbia circuit court in its now defunct efforts to invoke due process on behalf of the public at large.[371] The due process clause protects individuals from the potential excesses of the public acting through its elected representatives. If the public's own interests require greater procedural safeguards, Congress should impose them.

Beginning with allocation proceedings, the private interests at stake consist principally of the interests of each direct and indirect customer in continuing to receive a given quantity of energy. The supplier also may have a more indirect interest in the outcome, as the choice of allocation schemes may affect its profitability, the marketability of its product, administrative costs, and customer and public relations. Assuming arguendo that these economic interests are protected by the due

process takes the agency back to essentially a case-by-case approach. For instance, it is common for EPA rulemakings to encompass only one facility even though the rule is stated as being generally applicable to all facilities sharing stated characteristics. Even though there is no meaningful difference between rulemaking and adjudication in this situation, reviewing courts have been willing to permit the agency to use informal rulemaking procedures to issue such a rule. *See* Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1306 (10th Cir. 1973). *See also* South Terminal Corp. v. EPA, 504 F.2d 646, 661 (1st Cir. 1974).

369. United States v. Florida E. Coast Ry. Co., 410 U.S. 224, 246 (1973).

370. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

371. See text accompanying notes 280-93 *supra*.

process clause,[372] they must be considered relatively substantial. Still, the position of a consumer harmed by an adverse allocation decision is by no means as "desperate" as the position of the AFDC recipient whose benefits were terminated in *Goldberg*.

The analysis of interests affected by rate design decisions is virtually identical. Again, the impact on the supplier, while potentially substantial, is indirect.[373] The interest of the affected consumers is in obtaining access to the fuel at the lowest possible rate. Of necessity, the pecuniary interest of the consumer in a rate design proceeding is no more than in an allocation proceeding, because the consumer always has the option of switching to another form of energy if the rate design adopted makes such substitution appealing.[374] Once again, the interests must be considered substantial, but the aggrieved party's situation scarcely can be characterized as "desperate."

Rate level cases implicate comparable consumer interests, but much greater interests on the part of suppliers. However, even the supplier's interest in a reasonable rate of return cannot be likened to that of the welfare recipient's interest in means for survival. Moreover, the public interest in seeing energy suppliers remain in business and expand to meet increasing demand is sufficient to make it unlikely that revenues would be constrained below the zone of reasonableness for a sustained period of time.[375] Thus, the long-term threat to suppliers' interests is more illusory than real.

The private interests at stake in a licensing proceeding include those of the applicant, consumers dependent upon the applicant, and residents of the potentially affected area who might be exposed to danger, a less pleasant environment, or reduced property values. Again assuming that the interests of the supplier and its customers are protected by due process, the availability of alternative sites and alternative designs, albeit at higher costs, nonetheless render those interests substantially protected. The residents of the affected area have perhaps the most compelling cluster of interests, particularly with respect to al-

372. Throughout the discussion of interests affected by agency action, it is assumed that all of those interests are protected under the due process clause. It is also assumed that the government's involvement in any deprivation is sufficient to invoke due process constraints of some type. Of course, if these assumptions do not apply, no due process constraint on agency procedure exists.

373. A change in rate design may materially affect the marketability of a product, which, in turn, increases the supplier's risk of incurring a loss. *See* Pierce, *Natural Gas Rate Design: A Neglected Issue*, 31 VAND. L. REV. 1089 (1978).

374. See note 126 *supra*.

375. *See* Permian Basin Area Rate Cases, 390 U.S. 747, 790-92 (1968).

leged safety hazards, but again their situation is hardly "desperate." Moreover, *Vermont Yankee* teaches that an agency actually can expose the residents in the vicinity of a new facility to alleged safety hazards simply by resolving safety issues in generally applicable rulemaking proceedings, thereby precluding submission of evidence on those issues in a subsequent licensing proceeding. There seems to be little reason to require the agency to give these same interests a higher level of protection when it attempts to reach the same result through a slightly different approach.

The Risk of an Erroneous Determination

The three-part due process test next assesses "the risk of an erroneous determination of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards."[376] There are actually two components to this factor: the risk of an inaccurate determination of a material fact, and the extent to which the risk can be reduced by adding or substituting oral adjudicatory procedures. A relatively high risk of error may be assumed in making one or more material factual findings in any of the four types of proceedings. At least this is the case if the baseline for comparison is notice and comment rulemaking of the type employed routinely before Judge Levanthal's opinion in *Portland Cement*. If, however, an agency provides timely notice of the essential methodology and facts upon which it proposes to rely, as *Portland Cement* requires, adjudicatory proceedings become much less significant in reducing the risk of error.[377] Indeed, if the agency employs more elaborate written procedures designed to permit parties to probe the factual allegations of agency staff and other parties,[378] the substitution of oral evidentiary procedures actually might increase the chance of error.

Cost of Additional Procedures

The third factor in the due process test is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[379] This description of procedural costs encompasses not only direct costs to the government, but the total economic costs of the pro-

376. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
377. See notes 204-16 & accompanying text *supra*.
378. See text accompanying notes 217-39 *supra*.
379. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

cedures required.[380] If the former only was intended, to permit a proper balance to be struck this factor should be interpreted to include all costs, direct or indirect, irrespective of the party initially incurring the costs. With this broad definition of costs in mind, the empirical analysis of the FPC's attempts to implement natural gas curtailment policies becomes directly relevant to the efficiency portion of the due process test.[381] As this analysis demonstrates, the aggregate costs of using oral evidentiary procedures to formulate and apply energy allocation policies to individual suppliers is staggering. Given the available alternatives of rulemaking under the expanded notice concept and a variety of hybrid decisionmaking procedures, the due process balancing test could not conceivably require oral evidentiary hearings. What remains is to determine the extent to which the factors causing the high costs of oral adjudication in energy allocation proceedings also exist in the other types of cases.

The factors that cause the exceedingly high cost of adjudication in allocation proceedings include: (1) a large number of substantially affected parties; (2) a large number of factual, policy, and legal issues; (3) the incentive for many different positions to be taken because of complex interrelation of issues; and (4) issues of a type where delay in final resolution has the potential to interfere significantly with the operation of the economy. The first three factors are, of course, interrelated, and where the number of parties is high, the other factors typically are present as well. When only the first three coincide, resolution of the issues using oral adjudication predictably will be extremely time-consuming. This indicates the direct costs of using adjudicatory proceedings. When the fourth factor is also present, as is almost always true in energy regulatory proceedings, significant indirect economic costs are also predictable.[382] The aggregate costs of using trial-type procedures will then be so enormous that only a protected private interest of a very great magnitude, combined with a very high potential for enhanced accuracy of decisionmaking, should tip the balance in favor of a constitutional requirement for oral hearings.

Rate design proceedings share all of these same high cost characteristics with allocation proceedings. A natural gas pipeline rate design proceeding, for example, is virtually identical to a curtailment proceed-

380. Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1973) (Kaufman, J.). *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

381. See text accompanying notes 18-126 *supra*.

382. See text accompanying notes 108-26 *supra*.

ing.[383] The parties potentially affected include all distribution customers of the pipeline (typically eighty to one hundred), all customers who receive gas directly or indirectly from the pipeline (typically numbering in the thousands), the pipeline itself, and, in many cases, suppliers of the pipeline, as well as purchasers of gas who compete with the pipeline for access to supplies. In a proceeding involving high dollar stakes, many of these parties will choose to participate. The issues will extend from broad policy issues to facts specific to individual parties. Representative issues include the basic ratemaking standard, the rate or rates yielded by applying the standard to the pipeline's specific cost structure, the means and extent of adjustments when the revenues generated through use of the preferred standard exceed the revenues the pipeline is entitled to receive under the end result test, the elasticities of demand applicable to each class of customers, and which distributors and ultimate consumers have consumption characteristics appropriate to their placement in a particular rate class. Given the number of issues and the widely varying incentives of the affected parties, the possible permutations are infinite.

Finally, the potential effect of delay and uncertainty on the economy is closely analogous to that associated with curtailment or allocation issues. Until the rate design issues are resolved, the future price at which the form of energy involved can be purchased will be uncertain within a wide range of possible outcomes.[384] Consequently, oral evidentiary hearings can be expected to result in very high total economic costs.[385] Again, the interests at stake, while substantial, do not justify the drain on the economy, particularly when the marginal utility of oral proceedings is low in contrast to available written procedures for testing factual allegations.

Rate level proceedings present a somewhat different situation. A major distinction is that, with the exception of a very few issues such as

383. For descriptions of the types of issues raised in natural gas rate design proceedings, see TRANSMISSION, DISTRIBUTION AND STORAGE TECHNICAL ADVISORY TASK FORCE ON RATE DESIGN, FEDERAL POWER COMMISSION NATIONAL GAS SURVEY, REPORT TO THE FEDERAL POWER COMMISSION (1977); FEDERAL POWER COMMISSION OFFICE OF ECONOMICS, INCREMENTAL PRICING OF SUPPLEMENTAL SUPPLIES (1976); Pierce, *Natural Gas Rate Design: A Neglected Issue*, 31 VAND. L. REV. 1089 (1978). For descriptions of issues raised in electricity rate design proceedings, see Aman & Howard, *Natural Gas and Electric Utility Rate Reform: Taxation Through Ratemaking?*, 28 HASTINGS L.J. 1085 (1977); Cudahy & Malko, *Electric Peak-Load Pricing: Madison Gas and Beyond*, 1976 WIS. L. REV. 477.

384. *See, e.g.*, Trunkline LNG Co., [1977] UTIL. L. REP. (CCH) ¶ 11,924 (industrial consumers would pay varying rates depending on rate design employed).

385. See text accompanying notes 108-26 *supra*.

the treatment of construction work in progress,[386] all potentially affected parties other than the supplier have the same interest: a willingness to see the supplier obtain enough revenue to induce it to continue providing high quality service, but no more. The supplier's goal is, of course, to maximize long-term profits, which in the context of most rate level proceedings dictates a strategy designed to maximize short-term rates. Because of the limited number of positions that can be taken and the identity of interests among the customers, ultimate consumers, and the Commission staff, few parties can be expected to participate. Those that do are likely to coordinate their efforts, or at least to take positions at variance with one another only rarely. The limited number of parties and positions, and the limited rate of participation, make the proceeding much more manageable for the presiding ALJ and the ultimate decisionmaker.

Moreover, given that rate level increases typically are permitted to go into effect subject to refund after the conclusion of hearings,[387] the indirect cost of delay and uncertainty is much less,[388] at least with respect to that sector of the industry with high fixed costs in which the basic rationale supporting limitations on supplier revenue is the perceived existence of monopoly power. In the case of those parts of the industry where the rationale for the regulation is principally concern about windfall profits attributable to the peculiar temporal cost characteristics of extractive industries, delay and uncertainty concerning future rate levels may cost the economy dearly by reducing or eliminating the incentive to produce at all.[389] Thus, application of the cost-benefit analysis inherent in the three-part due process test to rate level proceedings yields a clouded result. Although the costs of using oral adjudication to resolve rate level issues seem tolerable, especially given the interests of both suppliers and consumers in obtaining accurate results, even here a good argument can be made against the use of oral hear-

386. Present ratepayers usually oppose including construction work in rate base, while potential future ratepayers typically support its inclusion. *See* Order No. 555, [1976] UTIL. L. REP. ¶ 5,617 (CCH).

387. *See, e.g.*, 15 U.S.C. § 717c(e) (1976).

388. Even with the agency's limited powers to suspend a new rate there are some indirect economic costs associated with delay in rate level proceedings involving public utilities. Since investors discount the value of revenues received subject to refund, the supplier may experience greater difficulty obtaining financing as long as a significant portion of its rates are subject to refund. In addition, even a suspension of only a few months sometimes can create significant cash flow problems that impair a supplier's ability to obtain needed financing.

389. *See generally* S. BREYER & P. MACAVOY, ENERGY REGULATION BY THE FEDERAL POWER COMMISSION 66-87 (1974).

ings, as less costly written procedures may prove equally capable of reducing error. For rate level proceedings involving suppliers engaged in extractive activities, the due process calculus should reject any mandatory use of oral evidentiary hearings. Without predictable future price levels, suppliers engaged in extractive activities have no way to gauge whether to mine or drill, due to their inability to calculate an anticipated rate of return.

The final area is licensing cases. Historically, licensing cases, if contested at all, were classic bipolar proceedings. This may explain their specific inclusion in the APA's definition of adjudication.[390] When opposition occurred, the issues generally were identical regardless of the number or motivation of the parties. Complications protracting the decisionmaking process arose only in the occasional comparative hearings initiated under *Ashbacker Radio Corp. v. FCC*[391] when competing applications were filed.

Simplicity in licensing proceedings disappeared as the duty to explore alternatives was imposed upon agencies, first by scattered court decisions interpreting agency organic acts[392] and then, comprehensively, by the National Environmental Policy Act.[393] While providing a needed framework for more rational agency decisionmaking,[394] this development has transformed all major licensing proceedings into a classic polycentric mold. Large numbers of project opponents now participate actively in licensing proceedings, each with different motivations and litigation strategies. The agencies' obligation to consider alternatives opens an almost infinite range of potential issues, including the need for the facility, and the possible alternative types, designs, and locations. As alternatives are suggested by the initial group of opponents, new parties unaffected by the original proposal but opposed to a suggested alternative emerge and suggest other reasonable alternatives, all of which must be considered by the agency before it can act. Exploration of each alternative, in turn, requires resolution of hundreds of

390. The APA's inclusion of licensing as adjudication may also be explained by a pre-APA case that seemed to require adjudicatory procedures for all licensing cases. Goldsmith v. United States, 270 U.S. 117 (1926). Of course, classification of licensing as adjudication does not alone mandate an adjudicatory hearing. See text accompanying notes 323-28 *supra*.

391. 326 U.S. 327 (1945).

392. *E.g.*, Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965); City of Pittsburgh v. FPC, 237 F.2d 741 (D.C. Cir. 1956).

393. 42 U.S.C. §§ 4321-4347 (1976). *See generally* Pierce, *Obtaining Agency Consideration of a Competing Proposal: Alternatives to Ashbacker*, 26 KAN. L. REV. 185 (1978).

394. *See generally* McGarity, *The Courts, the Agencies and NEPA Threshold Issues*, 55 TEX. L. REV. 801 (1977).

facts. The list of issues raised by any major proposal is interminable, and consequently so are the proceedings convened in an effort to resolve them.[395]

The direct costs associated with the use of oral evidentiary hearings in major licensing proceedings in themselves are staggering. For example, litigation costs incurred by the three competing applicants in the first phase of the proceeding to determine which pipeline project, if any, should be authorized to bring Prudhoe Bay gas to the lower forty-eight states[396] exceeded $200 million, with substantial costs yet to be incurred. A strong case can be made that the direct costs alone of using oral adjudication to resolve major licensing proceedings far outweigh any arguable benefits from enhanced accuracy. When the indirect economic costs associated with delay and uncertainty in licensing decisions are factored in, the result of the analysis under the three-part due process test becomes all too clear.

Analysis of the economic impact of delay in licensing decisions must first be considered from the supplier's perspective. Decisions to apply for a license to construct a generating plant, gas pipeline, electricity transmission line, or coal gasification plant are made primarily as a result of the supplier's projections of future demand for the product or service the facility will supply. Initially the supplier has available a wide range of alternative means of meeting projected future demand, but the high cost of investigating and supporting the desirability of the supplier's ultimate choice of a particular facility or site forces selection of a specific combination of site and design at a relatively early stage. Beyond this point, the supplier is deterred from supporting any alternative unless and until it becomes reasonably certain that its initial choice will not prevail. To do otherwise would mean both incurring additional costs to investigate and support the alternative and detracting from the credibility of the initial selection. If the application is granted in a relatively prompt manner, of course, the supplier's preferred project is usually built and the anticipated future demand is met; if denied promptly, the supplier can turn to a functional alternative and, with some delay and additional cost, apply to build the alternative. This

395. *See* REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES, THE NEW NATIONAL LIQUIFIED NATURAL GAS IMPORT POLICY REQUIRES FURTHER IMPROVEMENTS 14-15 (1977); AMERICAN GAS ASS'N, LNG FACT BOOK 30-31 (1977); REPORT TO THE COMPTROLLER GENERAL OF THE UNITED STATES, REDUCING NUCLEAR POWER PLANT LEADTIMES: MANY OBSTACLES REMAIN (1977).

396. *See generally* SENATE COMM. ON ENERGY AND NATURAL RESOURCES, DECISION AND REPORT TO CONGRESS ON THE ALASKA NATURAL GAS TRANSPORTATION SYSTEM (1977).

process continues until a project is approved. Thus, prompt decisions to deny applications impose only modest additional costs in terms of pre-application investigation and the licensing process itself.[397] Nor is a serious shortage of the energy form affected by the decision likely as a result of a six-month or year delay. In contrast, when reliance upon oral adjudication places the agency's decision on a project in limbo for several years, as is currently the case for most major energy projects,[398] the prospect of a serious future shortage of the affected form of energy emerges. Uncertainty concerning the future availability of forms of energy then retards general business investment through the decision-making process described in detail earlier in this Article.[399]

As with prolonged uncertainty concerning allocation or pricing policies, measuring accurately the costs of lengthy delays in licensing decisions in terms of reduced aggregate business investment is impossible, although these costs certainly are substantial. Over the last few years, most major corporations have added studies by energy consultants projecting the future availability of specific forms of energy as a significant factor in their investment decisionmaking process. In most cases, these reports indicate considerable uncertainty concerning such availability induced in large part by the facilities licensing process. This, in turn, limits decisions to expand existing plants or to build new plants because of the general investor aversion to risk. Thus, the aggregate costs, direct and indirect, of using adjudicatory procedures in the licensing process are damaging. Given the availability of less time-consuming written procedures, application of the three-part due process test should find that the constitution does not compel oral evidentiary procedures.

Applying the Test

The preceding analysis is only illustrative of the way in which the due process calculus can be applied to energy regulatory proceedings. Many important cases do not fall within any of the four general categories discussed. Application of the accepted three-part test to the four

397. This assumes, of course, that there is some project the agency is willing to approve. California regulatory agencies recently issued a sequence of decisions in which they appear to have rejected virtually all of the available alternatives for creating additional electric generating capacity in the state. *See California PUC Advises San Diego Gas and Electric as to Sundesert Proposal*, 20 NAT'L A. REGULATORY UTIL. COMM'R BULL. 13 (May 15, 1978) (Sturgeon, Comm'r, concurring; Symons, Comm'r, dissenting).

398. See note 395 *supra*.

399. See text accompanying notes 108-26 *supra*.

types of cases selected for illustrative analysis, however, suggests several important conclusions relevant to many other types of proceedings.

If the issue before the agency is of a type whose resolution will affect business investment decisions substantially, the costs of delay in resolving the issue will be very large. Written and hybrid procedures exist that can substitute effectively for trial-type procedures as means of decreasing the risks of inaccurate agency decisions. Applying these generalizations to most energy regulatory proceedings will show very high costs of requiring adjudicatory procedures with little benefit to the accuracy of the decisional process. This leaves only the importance of the protected private interest as a factor, which in these circumstances must be of great importance to justify constitutionally imposed adjudicatory procedures. This analysis makes clear that the number of energy regulatory proceedings involving individual suppliers or specific projects in which due process should require trial-type hearings is indeed extremely small.

Distinguishing or Overruling Prior Holdings

Of course, to adopt this approach to due process in the regulatory context, the Court must either distinguish or overrule portions of prior cases such as *Louisville & Nashville* and *Ohio Bell Telephone*. Consistent with its practice of the last several decades, the Court probably would choose to distinguish these cases, thereby narrowing their holdings by implication. Although several bases for such an approach exist,[400] the preferable approach by far would be to overrule expressly portions of these prior holdings. These decisions may well have made good law at the time they were decided; in the early part of this century the due process test probably should have yielded holdings requiring trial-type procedures in most regulatory proceedings. Earlier regulatory proceedings had fewer issues and fewer parties, permitting adjudi-

400. For instance, in *Louisville & Nashville*, the holding involved only the requirement that an agency decision be based upon substantial evidence. The statements in the opinion concerning procedures required in administrative proceedings must be considered mere dicta, since the agency in fact employed full adjudicatory procedures. 227 U.S. 89, 90 (1913).

In *Ohio Bell Telephone*, the holding undoubtedly was influenced by the fact that the company was not apprised of the factual basis for the agency's decision *through any means*. 301 U.S. 292, 300 (1936). Thus, it may properly stand for the proposition that a party must be put on notice of the factual basis for an agency's proposed action, rather than mandating the specific procedures that must be used by the agency to make those facts known. This interpretation of *Ohio Bell Telephone* would render it entirely consistent with the expanded notice doctrine announced in Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973).

cation to be used at significantly lower cost. Moreover, only in recent years have institutionalized nonadjudicatory procedures emerged to provide effective and less expensive substitutes for trial-type hearings. Thus, the much greater complexity of modern regulatory proceedings and the wide spectrum of sophisticated nonadjudicatory procedures now available to agencies call for a different result through application of the due process balancing test.

Will the Expanded Notice Concept Survive After Vermont Yankee?

Language in *Vermont Yankee* suggests that opinion to be a precursor to decisions in which the Court will dismantle all or most of the procedural protections imposed upon informal rulemaking by the District of Columbia circuit court during recent years,[401] including nonadjudicatory procedures mandated in *Portland Cement*.[402] Such an extension of *Vermont Yankee* would be unnecessary and unfortunate. The expanded notice concept differs materially in several respects from the requirement that agencies adopt some form of oral evidentiary hearing. The expanded notice concept is statutorily based, and does not significantly increase the costs of informal rulemaking. Its continued vitality is consistent with the desire to avoid rigidifying procedural requirements through constitutionalization.

The Basis for the Concept

The basis for the District of Columbia circuit court's imposition of adjudicatory procedures in some types of rulemaking proceedings was never entirely clear. However, because the court explicitly denied reliance on statutes, the only conceivable source of judicial power was the Constitution. Because the constitutional analysis leading to imposition of adjudicatory requirements was flawed significantly, the court properly eliminated the requirements. The expanded notice concept, on the other hand, is based entirely upon statutory interpretation.

Reasoning from the APA's requirement that agency action taken through rulemaking must be accompanied by "a concise general statement of . . . basis and purpose,"[403] the court concluded that an agency's failure to respond to well-supported comments rendered the action arbitrary and capricious. The purported basis for a proposed rule cannot be criticized effectively without knowing the basis well in

401. 435 U.S. 519, 524-25 (1978).

402. For the requirements imposed in *Portland Cement* see text accompanying notes 204-16 *supra*.

403. 5 U.S.C. § 553(c) (1976).

advance of the date on which comments are due; hence, logically the agency must include the basis for its proposal as part of its "notice" of proposed rulemaking. Thus, the expanded notice concept is defensible purely as an interpretation of the APA. In the context of actions by the FERC and the ERA, this concept also is amply supported by the agencies' organic acts.[404]

Expanded Notice Does Not Substantially Increase Decisionmaking Costs

In striking down the District of Columbia circuit court's selective requirement for adjudicatory procedures, the Court emphasized its belief that the inevitable effect of these requirements would be to force all agencies "to adopt full adjudicatory procedures in every instance."[405] With this result, "all the inherent advantages of informal rulemaking would be totally lost."[406] Unfortunately, the Court appeared to stress the nature of the dispute and the controverted facts,[407] thereby leaving the impression that its decision was based at least in part upon Professor Davis' theory that "legislative facts" are not amenable to testing through cross-examination or comparable procedures. But if the proposition is accepted that as many "legislative facts" are subject to and in need of testing as "adjudicative facts," the sole reason for eliminating the selective requirement for oral adjudication becomes the efficiency of rulemaking. In this regard, the Court's position that selective post hoc adjudicatory requirements would eliminate that efficiency was well taken. However, expanded notice does not suffer from this shortcoming. Certainly, expanding the notice requirement and the corollary that the agency respond to responsible criticisms will increase the costs of decisionmaking. Even though the necessary documentation already should be available within the agency, assembling and making available that documentation to the public is not without cost. Moreover, a rulemaking conducted under the expanded notice doctrine obviously will take longer to conclude than a typical pre-*Portland Cement* rulemaking. The increased cost associated with this procedural safeguard, however, is nowhere near the same order of magnitude as the

404. For example, the Department of Energy Organization Act requires both FERC and ERA to provide detailed statements of the basis for their proposed actions. 42 U.S.C. § 7191(b)(1) (Supp. I 1977).

405. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 546-47 (1978).

406. *Id.* at 547.

407. *Id.* at 524 n.1. *See also* United States v. Florida East Coast Ry. Co., 410 U.S. 224, 245 (1973).

costs incurred through substitution of full adjudicatory procedures.[408]

Expanded Notice Is Consistent With Constitutional Restraint

Yet another reason for leaving intact the expanded notice requirement is avoidance of what otherwise would be a very difficult constitutional issue. Due process is not an all-or-nothing proposition; its requirements are flexible. Due process may require expanded notice in many rulemaking proceedings where adoption of adjudicatory procedures is not mandated. The result of applying the due process test when considering whether an opportunity for the affected parties to criticize the factual basis for an agency "rule" affecting substantial private interests prior to its adoption might be to mandate expanded notice as a matter of constitutional law. The nature of the protected interest remains the same, of course, but the other factors are very different. The potential for material factual error is much greater when informal rulemaking without expanded notice is relied upon. The marginal benefits to accuracy resulting from requiring additional procedures are greater. The costs of requiring additional nonadjudicatory procedures are much less.

This is not an argument in support of constitutionalizing the expanded notice requirement. Rather, it is an argument for avoiding the need to confront such a difficult constitutional law issue by interpreting the APA and organic acts in a manner that continues to avoid the constitutional issue. This leaves Congress free to change the procedural requirements over time to reflect changing conditions. The Court need resolve the issue in the future only if Congress amends the APA in a manner explicitly eliminating the expanded notice requirement; in that case, the analysis of the amendment would take place in the context of the realities of administrative proceedings as they exist at the time of such an amendment.

Implications for Congress and Agencies

Most of the foregoing discussion speaks to future court interpretations of the due process clause, APA, and existing organic acts suggested by an analysis of the empirical data gathered for this Article. There remain the critical questions of the extent to which Congress should restrict agency discretion to select procedures and how agencies should exercise the procedural discretion granted them.

The empirical data suggests, at least in the context of major energy

408. See text accompanying notes 18-135 *supra*.

regulatory decisions, that statutes rarely should require full adjudicatory procedures, even when the agency chooses to regulate on a case-by-case basis. There undoubtedly are exceptions to this generalization where interests affected by the outcome of the proceeding are so important that extraordinarily inefficient procedures are justified,[409] or where the bipolar nature of a class of controversies renders oral evidentiary hearings possible at tolerable costs. Congress, however, should recognize that in most situations imposing a statutory requirement that an agency use full adjudicatory procedures is tantamount to a requirement that the agency not select or implement any policy in the area.

Agencies either should be given discretion to select procedures from the spectrum available under the due process clause and the APA, or should be required by their organic acts to use a carefully devised hybrid procedure. The choice here, of course, depends upon the extent to which Congress trusts the agency to exercise its discretion wisely versus the extent to which Congress has confidence in its own ability to devise appropriate procedures that will retain validity over time in a variety of applications. Giving the agency substantial procedural discretion must be considered the preferred choice.

Energy regulation agencies should avoid full adjudicatory procedures except in those very rare instances in which they are required by due process or applicable statutes. The only situation in which voluntary selection of full adjudicatory procedures to resolve major issues will further agency interests is when the agency seeks to present a facade of active policy implementation in an area in which it actually

409. Of course, Congress must consider the public interests potentially affected by agency actions, rather than confining its concern to the private interests affected. Thus, it is not only possible, but likely, that Congress would require more elaborate procedural safeguards in some types of proceedings than the minimum compelled by due process. However, the cost of using adjudication to resolve issues affecting large numbers of parties and influencing the nature and level of investment is so extraordinarily high that it is a very rare cluster of public and private interests that justifies statutorily mandated trial-type hearings. Since the effect of requiring adjudicatory proceedings prior to formulating or implementing regulatory policy often is to preclude the agency from acting in the area at all, Congress should turn its attention to nonadjudicatory procedures or to highly selective and narrowly defined adjudicatory procedures if it believes that the interests affected justify procedural safeguards greater than those required by due process. If Congress believes that the risks of going forward with a particular policy are so great that it wants to preclude the agency from acting in the area until the nature and extent of the risks are better known, as is arguably the case with nuclear power plant design, it should simply impose a statutory moratorium on agency actions. The clear message of such a moratorium would be to ignore the nuclear option as an immediately viable means of meeting additional demand for electricity and to pursue available alternatives instead. This course of action would be far preferable to the investment-retarding uncertainty created by telling the agency to develop a policy and then requiring it to use procedures that make it impossible to develop and implement any policy.

wants to avoid taking any action. An agency sincerely trying to make and apply policy efficiently and effectively should search for appropriate procedures somewhere between informal rulemaking with full notice of basis and full adjudication. The procedures adopted by the FPC in its gas producer rate proceedings, with the additional procedural safeguards suggested earlier in this Article,[410] provide a basic framework that offers considerable promise for many types of regulatory decisionmaking.

410. See text accompanying notes 217-39 *supra*.